Supreme Court of the United States

OCTOBER TERM, 1963

No. 558

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

JOHN BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., doing business as BROWN FOOD STORE, TOOTIE SCHNAUBERT, doing business as CASHWAY FOOD STORE, SAFEWAY FOOD STORE, INC. and ARNOLD CRABB, doing business as THRIFTY WAY FOOD STORE, RESPONDENTS

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.—filed July 25, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, the officers, agents, successors and assigns of each. Case Nos. 28-CA-626, 28-CA-627, 28-CA-629-1-2, 28-CA-630 and 28-CA-640.

In support of this petition the Board respectfully shows:

(1) Respondents are engaged in business in the State of New Mexico, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

[fol. 2] (2) Upon due proceedings had before the Board in said matter, the Board on May 4, 1962, duly stated

its findings of fact and conclusions of law, and issued an Order directed to the Respondents, the officers, agents, successors and assigns of each. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said order of the Board, and requiring Respondents, the officers, agents, successors and assigns of each to comply therewith.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations
Board

Dated at Washington, D. C. this 16th day of July, 1962.

IN UNITED STATES COURT OF APPEALS

ANSWER TO PETITIONER'S PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.— filed September 14, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Tenth Circuit:

[fol. 3] For answer to the Petition of the Petitioner in the above-entitled cause, Brown Food Store, et al, Respondents above named, would respectfully show the Court:

I.

Respondents admit that the United States Court of Appeals for the Tenth Circuit has jurisdiction of this cause by virtue of Sec. 10(e) of the National Labor Relations Act, as amended.

II.

Respondents deny that an Order of Enforcement should be issued by the Court, and take exception to all findings of fact and conclusions of law as stated in the Order of the National Labor Relations Board dated May 4, 1962.

III.

Respondents admit, as alleged in Petitioner's paragraph (2), receipt of the Board's Decision and Order.

Wherefore, the Respondents pray this Honorable Court that it cause notice of the filing of this Answer to be served upon the Petitioner, and that this Court take jurisdiction of the proceedings of said cause, and upon final hearing hereon that this Court enter its Judgment and Order Denying the enforcement of said Order dated May 4, 1962, and for such other relief as may be proper in the premises.

Respectfully submitted,

CLARK, REED & CLARK
By ROBERT L. CLARK
Attorneys for Respondents

* * * *

[fol. 4]

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., d/b/a BROWN FOOD STORE Case No. 28-CA-626

TOOTIE SCHNAUBERT d/b/a CASHWAY FOOD STORE Case No. 28-CA-627

SAFEWAY FOOD STORE, INC. Case No. 28-CA-629-1-2

ARNOLD CRABB d/b/a THRIFTY WAY FOOD STORE Case No. 28-CA-630

FOOD JET, INC. Case No. 28-CA-640

LENN JONES, AGENT OF MULTI-EMPLOYER BARGAINING ASSOCIATION and RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 462

INTERMEDIATE REPORT AND RECOMMENDED ORDER.—
August 23, 1960

Statement of the Case

This matter was tried before me in Carlsbad, New Mexico on June 21 and 22, 1960 upon the complaint of the General Counsel based upon charges duly filed by Retail Clerks International Association, Local 462, herein the Union, alleging that John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store, herein Respondent Brown, Tootie Schnaubert d/b/a Cashway Food Stores, herein Respondent Cashway, Safeway Food Store, Inc., herein Respondent Safeway, Arnold Crabb, d/b/a Thrifty Way Food Store, herein Respondent Thrifty,

Food Jet Inc., herein Respondent Food Jet and Lenn Jones, agent of a multi-employer bargaining association, herein Respondent Jones, jointly and severally had engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, herein the Act.

In essence, complaint is made that the Respondents locked out the employees listed in Appendix A attached hereto on March 16, 1960 and thereafter failed promptly to reinstate certain of them. It is further alleged as explicated at the hearing that Respondent Cashway by [fol. 5] granting merit increases to employees failed in its obligation to bargain with the Union.

Briefs have been received from counsel. Upon the entire record in the case and from my observations of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents

Each of the Respondents operates a retail food market or markets in Carlsbad, New Mexico, and each, during the 12-month period preceding the issuance of the complaint, did a gross business in excess of $500,000. Each, during the period mentioned, received shipments from points outside the State of New Mexico in amounts exceeding $50,000. I find that the business of each Respondent is in and affects commerce within the meaning of Section 2(6) and (7) of the Act.

II. The organization involved

The Union is a labor organization admitting to membership employees of each Respondent and for a substantial period of time prior to the events about to be related was and now is the exclusive bargaining representative of all employees other than meat department employees of the Respondents in a single unit encompassing all such employees.

III. The unfair labor practices

After the expiration of a bargaining agreement running between the Union and the Respondents, negotiations looking toward a new contract began in January, 1960. Respondent Jones was the authorized spokesman for all Respondents. On March 2 the Union advised the Respondents that a strike vote had been taken and a strike authorized. The Respondents told the Union of this occasion that they would consider a strike against any of them to be a strike against all.[1] On the morning of March 16 the Union established pickets at the entrances [fol. 6] to Respondent Food Jet carrying signs reading, "On Strike, Local 462 Retail Clerks." None of the employees of Food Jet in the bargaining unit reported for work. In consequence the employees in the bargaining unit represented by the Union at all of the Respondents were locked out and remained so until the strike was settled on April 22. Assertedly, because of a belief that three assistant managers, Walter Titus, Tony Lawson and Milton Moore were supervisory employees without the coverage of the bargaining unit, Respondent Thrifty Way permitted them to work through March 17. Upon advice that these three were considered to be in the unit they were then locked out and not again permitted to work until the end of the strike.

The evidence is convincing and not seriously controverted that the Respondents were determined to combat the attempt of the Union "to pick them off one at a time" by regarding the strike against Food Jet as a strike against all. It is asserted that the Respondents were thus taking defensive action to preserve their bargaining position and that their conduct under the holding in Buffalo Linen[2] is not unlawful.

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[1] Upon agreement of counsel, page 107 of the transcript is corrected by inserting following the word "that" on line 17 the following: "they would consider a strike against any of them to be a strike against all of them."

[2] Buffalo Linen Supply Company, etc., 109 NLRB 447. Enforced as N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Co.) 353 U.S. 87.

In the cited case, the Board held that a strike against one of the employers in a multi-employer unit was an exertion of economic pressure "to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship." Thus, the Board reasoned, the action of the nonstruck employers in shutting their plants was "defensive and privileged in nature rather than retaliatory and unlawful." Approving the Board's holding, the Supreme Court said, "in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful."

Explication of the status of the locked out employees is to be found neither in the decision of the Board nor in the opinion of the Supreme Court. They appear to have remained employees for emphasis is placed upon the fact that the shutdowns occasioning the lockouts were temporary. All employees were returned to their jobs. Although no such finding is made by the Board or the Court the rationale of the decision seems to rest in part upon [fol. 7] the assumption that when the employees of one employer struck, the employees of the other employers in the unit also became strikers and that the lockout did no more than recognize this to be a fact.

Coming back to the case at hand, each of the Respondents attempted to lessen the economic effect of the lockout by operating its market.[3] Respondent Food Jet, being faced with an economic strike, was wholly free to hire replacements on any basis it found expedient. The other Respondents hired employees on a temporary basis, transferred personnel from other operations, and used kin of managers or supervisors in order to keep their businesses open. The General Counsel contends that Buffalo Linen permits nothing beyond a shutdown following a lockout; that an attempt by an employer to operate in such circumstances is unlawful. An obvious, but not necessarily dispositive, answer to this contention is that

[3] Safeway closed one of its Carlsbad markets and operated the other during the lockout period.

if the employers have a right to lockout they should not be forced to accept a penalty of lost custom for exercising it. But the law is settled that a struck employer (and here I am treating the locked out employees as strikers) may not replace a striker, even temporarily, if the striker is offering unconditionally to return to work. Here the locked out employees had presented themselves to their employers ready to work and had been turned away. Having refused the offer of these employees to work, may the employers give the work, even temporarily, to others?

In Buffalo Linen the Supreme Court saw the problem of the defensive lockout as one involving "the balancing of the conflicting legitimate interests" of the employers in preserving their bargaining association and of the employees in exercising their right to strike. The Court thus has equated a "legitimate" interest with a protected one. That the Court intended this holding as a generalization is to be doubted. It seems unlikely that an employer in preservation of his "legitimate" interest in maintaining a wage scale could lawfully lock out his employees even upon a well founded belief that they would strike at a time unpropitious to the employer to obtain more.

It is clear that a lockout to counteract the exertion of economic pressure by a Union designed to "atomize" employer solidarity is lawful if it serves to bring about a balance of "conflicting interests". The lockout here, I am convinced and find, satisfies that criterion. But a [fol. 8] lockout is still a discrimination affecting tenure of employment and necessarily discourages membership in a labor organization. The purpose of a labor organization, in part at least, is to strengthen the bargaining position of employees by presenting a united front to an employer backed by the right to strike. If strike action cannot be taken within an area and at a time considered most favorable to the interest of the employees the value of the labor organization is diminished and the attraction of membership lessened. But such discrimination is not unlawful, Buffalo Linen holds, if it does no more than bring about a balance of "conflicting interests."

Applying the rationale of Buffalo Linen to the facts of this case, the lockout by the Respondents other than Food

Jet brought about such a balance and was not unlawful. But the Respondents continued their operations as the employers complained of in Buffalo Linen did not. The strike against Food Jet was designed to deprive Food Jet of trade and to force Food Jet and the other Respondents to accept the bargaining demands of the Union. The countering lockout deprived the locked out employees of earnings and lessened their ability to hold out for the terms desired by the Union. Thus the "balance" envisoned by the Supreme Court in the cited case was struck. Was it disturbed by the action of the Respondents in continuing to operate? I think clearly that it was. By keeping their business establishments open, the Respondents were enabled to make earnings or at least to minimize losses and thus were better positioned to withstand the strike that the Union had begun and more firmly to adhere to the bargaining position that they had taken. As the balance spoken of in Buffalo Linen was lost by the added weight thrown into the pan by the Respondents thus was lost, I find their immunity from the Act's prohibitions against discrimination. Because the Respondents, other than Food Jet, continued to operate during the period of the lockout, I find that they discriminated in regard to the hire and tenure of employment of their locked out employees to discourage membership in the Union and that the Respondent employers, other than Food Jet, thus violated Section 8(a)(1) and (3) of the Act.

In accordance with past practice, Respondent Cashway in February 1960, gave two of its employees merit increases. Cashway had routinely taken such action in respect to its employees on a number of occasions over the years and had never been requested to bargain with the Union about it. The complaint alleges that the Respondents thus refused to bargain with the Union. Merit increases are a subject for mandatory bargaining and the [fol. 9] cases so holding are numerous. All that have come to my attention, however, invoive a request for bargaining on the part of a union and a denial that such matters are within the scope of bargaining on the part of the employer. Here, Cashway was following a practice

of years standing without notice that objection on the part of the Union existed. I do not understand that Cashway has ever refused to bargain about merit increases. I find that no violation of the Act is presented in the circumstances.

Because of my disposition of the central question raised by the complaint there is no need to consider whethey any Respondent was remiss in returning the locked out employees to work after the strike settlement. All Respondents[4] other than Food Jet will be required to make the locked out employees whole for loss of earnings for the period each employee was thus prevented from working

I find that Food Jet has not violated the Act in any particular. As a struck employer it was of course free to continue operations as best it could. I do not find evidence to establish that Food Jet combined with the other Respondents to continue operations after locking out employees and thus perhaps to have participated in the commission of the unfair labor practice found above. It seems probable that in the nature of things the agreement among the Respondents did not go beyond an undertaking to lockout in the event one of them was *stuck*. There is no evidence of cooperation among them in manning the stores where the lockouts took place. I will recommend the dismissal of the complaint as to Food Jet.

The only unfair labor practice found is that connected with continued operations while employees were locked out. Respondent Jones participated in this, I find, only as an employee of Respondent Safeway. I find no unfair labor practice to have been committed by Respondent Jones as an individual and will recommend the dismissal of the complaint as to him.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III above occurring in connection with their operations

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[4] This includes Respondent Safeway only in respect to its store #62. I find no violation in connection with its other Carlsbad market, #43, which did not operate during the lockout period.

[fol. 10] described in Section I have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents other than Food Jet and Jones have engaged in unfair labor practices it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that certain Respondents have discriminatorily locked out employees it will be recommended that each such Respondent make its employees who were the subject of this discrimination whole for any loss of earnings suffered during the period of the lockout by a payment to each of a sum of money equal to that which each would have earned for the period that the market, in which he was prevented from working, operated on and after March 16, 1960, to the date when he was brought back to work. Loss of pay shall be computed on a quarterly basis in the manner set forth in F. W. Woolworth [5] with a deduction for net earnings during that period. As all of the locked out employees have been reinstated to their jobs and as there is no allegation that any employee was discriminatorily given a different job upon his return, no requirement of reinstatement will be made.[6]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By locking out employees the Respondents other than Food Jet and Jones have discouraged membership

[5] F. W. Woolworth, 90 NLRB 289.

[6] Evidence was taken showing that 2 employees were returned to jobs somewhat different from those held before the lockout but this was in support of the General Counsel's theory of a discriminatory lockout only.

in the Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

[fol. 11] 3. By the lockout the Respondents other than Food Jet and Jones have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The evidence does not establish any violation of the Act in respect to Food Jet or Jones.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that John Brown, Irvin L. Gossett and J. C. West, Jr., doing business as Brown Food Store, Tootie Schnaubert, doing business as Cashway Food Store, Safeway Food Store, Inc. and Arnold Crabb, doing business as Thrifty Way Food Store, all of Carlsbad, New Mexico, the officers, agents, successors and assigns of each shall:

1. Cease and desist from:

(a) Discouraging membership in the Union by locking out their employees to improve their bargaining position while continuing to operate their establishments;

(b) In any like or similar manner interfering with, restraining or coercing their employees in the exercise of the right to self-organization, to form, join, or assist Retail Clerks International Association, Local 462, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring

membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

[fol. 12] (a) Each respondent shall make whole its employees who were prevented from working for it for the period of operations during the lockout in the manner set forth in the section of the report entitled "The remedy";

(b) Make available to the Board or its agents upon reasonable request all payroll records, social security records, attendance records and reports and all other such data convenient for a calculation of the amount of back pay due under the terms of this recommendation;

(c) Each said Respondent shall post at its establishment in Carlsbad, New Mexico, copies of the appropriate notice attached hereto as an appendix. Copies of said notice to be furnished by the Regional Director for the Sixteenth *Regional* shall, after being duly signed by authorized representatives be posted immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other materials;

(d) Each shall notify the Regional Director for the Sixteenth Regional in writing within twenty (20) days from the date of this Intermediate Report and Recommended Order what steps it has taken in compliance.

It is further recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order each of the Respondents notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring such Respondent to take that action.

Dated: August 23, 1960.

WALLACE E. ROYSTER
Trial Examiner

Appendix A to Intermediate Report and Recommended Order

[fol. 13]

Brown Food Store:

Juanita Blanchard
Lupe Biscaine
Jerry Brooks
Bernice Turnbow

Food Jet:

Manuel Biscaino
Margerite Bridges
Joe Briones
Larry Brodie
N. G. Deanda
Marjorie Hoyt
Ray Starment

Cashway Food Store:

Bobby Barrs
Charles Blackburn
J. H. Carbell
Dwayne Compton
Jo Nell Cox
Charles Davis
Beverly Fletcher
Julian Fletcher
Charles Healer
Bobby Johnson
Alfredo Lira
Jesus Lira
Janie Miller
Wayne Madrall
O. J. Smith
Weldon Stafford
Dorothy Titus
Gary Watkins

Thrifty Way Food Store:

Addie Black
Belle Coalson
Robert Cummings
Wayne Davis
Allene Eggleston
Thomas Lawson
Terrell McBee
Militon Moore
Vonda Narramore
Roy Navarrette
John Pirtle
Doug Pryor
Eddie Razo
Herschell Skaggs
Walter Titus
Joe Vasquez
Mike Wiley

Safeway Food Store, Inc.

Store #62	*Store #43*
Ronald Bartholomew	Leo Blackburn
Ray Bradshaw	Reuben Carrasco
Harold G. Cannon	Virgie Hartley
Kenneth Chapman	Tom Hernandez
Juanita Durham	John Julianna
Grady Enger	Tony Matta
Vance Garner	Wanda McClary
Robert Hamblin	Timo Navarrette
Johnny Kimberling	Carl Smith
Raymond Methola	Jim Wilson
Mary Payte	
Dale Peden	
Glen Pike	
Lorene Sanders	
Allan Shahan	
David Tuttle	

[fol. 14]

APPENDIX

Notice To All Employees

Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Juanita Blanchard, Lupe Biscaine, Jerry Brooks and Bernice Turnbow.

We Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization to form labor organizations, to join, or assist Retail Clerks International Association, Local 462 or any other labor organization, to bargain collectively through repre-

sentatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

JOHN BROWN, IRVIN L. GOSSETT and J. C. WEST, JR., d/b/a Brown Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

[fol. 15] Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I Will make whole the employees locked our during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Bobby Barrs, Charles Blackburn, J. H. Carbell, Dwayne Compton, Jo Nell Cox, Charles Davis, Beverly Fletcher, Julian Fletcher, Charles Healer, Bobby Johnson, Alfredo Lira, Jesus Lira, Janie Miller, Wayne Madrall, O. J. Smith, Weldon Stafford, Dorothy Titus and Gary Watkins.

I Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization to form labor organizations, to join, or assist Retail Clerks International Association, Local 462 or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

TOOTIE SCHNAUBERT d/b/a
Cashway Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

[fol. 16] Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Ronald Bartholomew, Ray Brad-

shaw, Harold G. Cannon, Kenneth Chapman, Juanita Durham, Grady Enger, Vance Garner, Robert Hamblin, Johnny Kimberling, Raymond Methola, Mary Payte, Dale Peden, Glen Pike, Lorene Sanders, Allan Shahan and David Tuttle.

We Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization to form labor organizations, to join or assist Retail Clerks International Association, Local 462 or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

Safeway Food Store, Inc., Store #62
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX

Notice To All Employees

Pursuant To The Recommendations Of A Trial Examiner of the National Labor Relations Board, and in order [fol. 17] to effectuate the policies of the National Labor Relations Act, I hereby notify my employees that:

I will make whole the employees locked out during the period on and after March 16, 1960 and until they were reinstated for any loss of pay suffered at a time when this market was open for business. The employees to be made whole are: Addie Black, Belle Coalson, Robert Cummings, Wayne Davis, Allene Eggleston, Thomas Lawson, Terrell McBee, Milton Moore, Vonda Narramore, Roy Navarrette, John Pirtle, Doug Pryor, Eddie Razo, Herschell Skaggs, Walter Titus, Joe Vasquez and Mike Wiley.

I Will Not by means of unlawful lockout or in any like or similar manner interfere with, restrain, or coerce my employees in the exercise of their right to self-organization to form labor organizations, to join or assist Retail Clerks International Association, Local 462, or any other labor organization to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

ARNOLD CRABB d/b/a Thrifty Way Food Store
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT EMPLOYERS' EXCEPTIONS TO INTERMEDIATE REPORT AND RECOMMENDED ORDER— September 29, 1960

Respondent employers John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store; Tootie Schnaubert d/b/a Cashway Food Store; Safeway Food [fol. 18] Store, Inc.; and Arnold Crabb d/b/a Thrifty Way Food Store, hereby file their exceptions to the Intermediate Report and Recommended Order of Trial Examiner Wallace E. Royster, dated August 23, 1960, at Washington, D.C., as follows:

(1) To the Trial Examiner's finding that "Here the locked out employees had presented themselves to their employers ready to work and had been turned away" (I.R. p. 3, lines 33-34), for the reason that the record evidence fails to support the finding that all employees in the multi-employer bargaining unit reported to work on the day of the strike prior to the lockout.

(2) To the Trial Examiner's finding and conclusion that "Because the Respondents, other than Food Jet, continued to operate during the period of the lockout . . . that they discriminated in regard to the hire and tenure of employment of their locked out employees to discourage membership in the Union and that Respondent employers, other than Food Jet, thus violated Section 8(a)(1) and (3) of the Act" (I.R. p. 4, lines 23-28), for the reason that such finding and conclusion is contrary to, and unsupported by, the record facts and the law.

(3) To the Trial Examiner's finding and conclusion that "The activities of Respondents set forth in Section III (of the Intermediate Report) . . . tend to lead to labor disputes burdening and obstructing commerce" (I.R. p. 5, lines 15-19), for the reason that such finding and conclusion is unsupported in fact and in law.

(4) To the Trial Examiner's recommended order that Respondents make the "employees who were subject to this discrimination whole for any loss of earnings suffered

during the period of the lockout. . . ." (I.R. p. 5, lines 28-34), for the reason that such finding and conclusion that Respondents discriminatorily locked out their employees and that such employees, as a result thereof, are entitled to back pay is unsupported in fact and in law.

(5) To the Trial Examiner's finding and conclusion that "By locking out employees the Respondents other than Food Jet and Jones have discouraged membership in the Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act (I.R. p. 5, lines 49-52), for the reason that such finding and conclusion is unsupported in fact and in law.

[fol. 19] (6) To the Trial Examiner's finding and conclusion that "By the lockout the Respondents other than Food Jet and Jones have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act (I.R. p. 6, lines 1-5), for the reason that such finding and conclusion is unsupported in fact and in law.

(7) To the Trial Examiner's finding and conclusion that "The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act (I.R. p. 6, lines 7-8), for the reason that such finding and conclusion are unsupported in fact and in law.

(8) To the cease and desist provisions of the Trial Examiner's Recommended Order (I.R. p. 6, lines 24-39), for the reason that the record facts and the law fail to sustain the unfair labor practice findings and conclusions which are the basis for such recommendations.

(9) To the affirmative action provisions of the Trial Examiner's Recommended Order (I.R. p. 6, lines 40-61; p. 6, lines 1-3), for the reason the record facts and the law fail to sustain the unfair labor practice findings and conclusions which are the basis for such recommended affirmative action.

Respondents respectfully request that upon consideration of the foregoing Exceptions that the Board set aside the

Trial Examiner's unfair labor practice findings, conclusions, and recommendations and dismiss the complaints herein in their entirety.

CLARK, REED & CLARK

By WILLIAM L. KELLER
Attorneys for Respondent Employers

Dated at Dallas, Texas this 29th day of September, 1960

[fol. 20] BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER—May 4, 1962

On August 23, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled consolidated proceeding, finding that the Respondents, with the exception of Food Jet, Inc., and the individual Respondent, Lenn Jones, had engaged in, and were engaging in, certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents, except for the two mentioned above, filed exceptions to the Intermediate Report together with a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief and the entire record in the cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner for the reasons stated below.

Each of the Respondents operates one or more retail food stores in Carlsbad, New Mexico. They have been bargaining on a multiemployer association basis with the

Union since 1957 and have had a series of collective-bargaining contracts since that time.[1] In January 1960, the employer Association and the Union opened negotiations for a new contract, and by March 2 they had agreed on all terms except the Union's proposal for retroactive wage increases and the effective date for such increases. On March 2, the Union authorized a strike to implement these demands and notified the Association of this decision. The Association thereupon advised the Union that the employers would consider a strike against any member of the group to be a strike against all.

On March 16, the Union struck and picketed Food Jet, one of the five Association members involved here. The other four employers, operating six stores, immediately locked out all of their employees, telling them that they would be returned to work at the conclusion of the strike. Each Respondent thereafter individually attempted to continue operating. Food Jet obtained replacements for its striking employees. The other four employers functioned with the assistance of supervisory personnel, rela- [fol. 21] tives of management, and new employees hired on a temporary basis.[2] Thus, none of the Respondents who locked out its employees in fact closed down during the period of the lockout.

During this period the parties continued their negotiations, and on April 22, they reached a final agreement. Accordingly, the strike and lockouts were terminated and the employers immediately recalled all their employees. Throughout the strike and lockout the Respondents continued in effect all employee benefits in behalf of their regular employees.

The Trial Examiner found that the initial lockout by the nonstruck employers was a permissible defensive

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[1] The relationship between the contracting parties has always been an amicable one, and their contracts have contained union shop provisions.

[2] Each of these employers hired temporary replacements who were told at the time of hiring that their employment was only for the duration of the strike. Several of the chain stores also brought in supervisors and clerks from other stores in outlying areas.

measure to protect the solidarity of the multiemployer unit under the rule of Buffalo Linen Supply Company.[3] However, he reasoned that the additional action of those employers in continuing to operate their businesses during the lockout had upset the delicate balancing of interests struck in the Buffalo Linen case and hence was not privileged under that decision. He therefore concluded that by continuing to operate during the peroid of the lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their locked-out employees to discourage membership in the Union in violation of Section 8(a)(3) and (1) of the Act and that the lockout was thereby rendered unlawful. We agree with the Trial Examiner's conclusion that the nonstruck employers violated the Act by locking out their employees in the circumstances involved here.

The Buffalo Linen case involved a whipsaw situation where nonstruck members of a multiemployer association unit temporarily shut down operations when a union struck an employer member of the association to implement bargaining demands in the multiemployer unit. Departing from a long line of its own precedents, the Board there held in effect that the resulting lockout was a legitimate defensive means of protecting the integrity of the multiemployer bargaining unit against the disintegration threatened by the whipsaw strike. The Supreme Court, in affirming the Board's decision, observed that the "ultimate problem is the balancing of the conflicting [fol. 22] legitimate interests [of "employees and employers"] and that the "difficult and delicate responsibility" for striking that balance was committed primarily to the Board.

While the present case has its similarity to the Buffalo Linen situation, there is a critical difference between the two cases. The underlying rationale of Buffalo Linen was that a shutdown was deemed appropriate to preserve the established unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for

[3] N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Company), 353 U. S. 87, affirming 109 NLRB 447.

Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inapposite where, as here, the employers do not shut down. A lockout, needless to say, is a drastic form of discrimination and its use in the present case far exceeds the justification for the otherwise discriminatory measure endorsed in Buffalo Linen. That the nonstruck Respondents, in replacing their employees, may have acted in self-interest rather than specifically to discourage union membership, or the Union's strike at Food Jet, does not negate their unlawful intent. The Supreme Court in its recent Local 357 [4] opinion thus took the occasion to reiterate its holding in Radio Officers [5] that "[s]ome conduct may by its very nature contain the implications of the required intent [where] the natural foreseeable consequences of [the] actions . . . warrant the inference." Cf. Gaynor News Co., Inc. v. N.L.R.B., 347 U.S. 17, 37; Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 795.

We conclude, in balancing the conflicting interests of the employees and the Respondents under the particular circumstances of this case, that the nonstruck Respondents were not justified in replacing their employees because of a strike called by the Union against Respondent Food Jet. Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate [fol. 23] with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

With all respect, we think our dissenting brethren, in equating Food Jet's right to replace strikers with the asserted right of Respondents to operate with replace-

[4] Local 357, Teamsters Union v. N.L.R.B., 365 U.S. 667, 675-676.

[5] Radio Officers Union v. N.L.R.B., 347 U.S. 17, 45.

ments during the lockout, are overlooking a significant difference in the respective positions of Food Jet and Respondents, and are also overlooking the basic considerations which give rise to the right to lockout. It must be remembered that the statutory protection accorded to strikers is diminished under the Mackay case,[6] to the extent that an employer is free to replace economic strikers, and that the reason for this impairment or diminution of the protection is the need to accommodate the employer's legitimate conflicting interest in maintaining production. As applied to this case, Food Jet is free to operate with replacements, because only by hiring such replacements can it operate at all; its regular employees are unwilling to work at its terms. But the other members of the employer unit are not required to resort to replacements; their regular employees are willing to work at the employers' terms.

It is, of course, true that under Buffalo Linen, Respondents are not required to operate and await a whipsawing strike. That case, like Mackay, permits an abridgement or diminution of the statutory protection, and holds that where a union strikes one member of a bargaining unit as part of a whipsawing operation, the other members for the purpose of protecting the bargaining unit may lawfully shutdown and lockout the employees. The purpose of this exception to the rule against lockouts for union activity is to prevent unfair advantage being taken of the members of an employer unit. If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the "whipsaw." For this reason, if one member is shut down by a strike, the others may also shutdown, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be *reasonable* inferred that [fol. 24] they do so not to protect the integrity of the em-

[6] N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333.

ployer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be "defensive" and becomes "retaliatory." Buffalo Linen, 109 NLRB at 448, quoted at 353 U.S. at 91.

We find, therefore, that the Respondents, other than Food Jet, interfered with, restrained and coerced employees in the exercise of their right to bargain collectively and to strike in furtherance of economic demands, and violated Section 8(a)(1) of the Act by replacing them while they were still willing to work and were not on strike. We also find that such conduct constituted unlawful discrimination within the meaning of Section 8(a)(3) of the Act, in discouraging employees from supporting the Union and from engaging in concerted activities for mutual aid and protection.[7]

Order

The Board adopts as its Order the cease and desist and affirmative action Recommendations of the Trial Examiner with the modification of Provision 2(d) to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondents have taken to comply herewith."[8]

Dated, Washington, D. C. May 4, 1962.

FRANK W. MCCULLOCH, *Chairman*
BOYD LEEDOM, *Member*
GERALD A. BROWN, *Member*
National Labor Relations Board

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[7] See Utah Plumbing and Heating Contractors v. N.L.R.B., 294 F. 2d 165 (C.A. 10); Quaker-State Oil Refining Corp. v. N.L.R.B., 270 F. 2d 40 (C.A. 3), cert. denied, 361 U.S. 917. Compare: Betts Cadillac, Olds, Inc., 96 NLRB 268; International Shoe Company, 93 NLRB 907; Duluth Bottling Association, 48 NLRB 1335.

[8] In the notices attached to the Intermediate Report as Appendices, the words "Decision And Order" are hereby substituted for the words "The Recommendations Of A Trial Examiner." In the event that this Order is enforced by a decree of a United States Court of Appeals, the words "A Decree Of The United States Court Of Appeals, Enforcing An Order" shall be substituted for the words "A Decision And Order."

[fol. 25] MEMBERS RODGERS AND FANNING, DISSENTING:

The majority acknowledges that members of an employer association, faced with the threat of successive whipsaw strikes, may lock out their employees, in accordance with the Supreme Court's explicit holding in Buffalo Linen, supra, but finds they may not thereafter attempt to operate with temporary replacements, even though no unlawful motivation is alleged or shown. We believe this decision is illogical, and not warranted by either the statute or the realities of multiemployer bargaining.

As a matter of statutory interpretation, we do not believe the securing of temporary replacements in this situation can be held to have unlawfully discouraged union membership. Granting that the employers' initial lockout was permissible, as the Supreme Court has held, it seems clear that temporarily replacing the employees for the duration of the strike did not further affect their employment status or union adherence, particularly since the employees in this case were expressly told by Respondents they would have their jobs at the end of the strike.[9] The discrimination, if any, took place at the point of the initial lockout, and the Supreme Court has held this to be privileged in the whipsaw situation. How can the performance of a nondiscriminatory act make unlawful something which was theretofore privileged? [10]

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[9] All employees were retained during the lockout on company records as employees, and continued to receive vacation, insurance, and other company benefits. All were returned to their jobs, and the replacements discharged, at the end of the strike and lockout.

[10] Our colleagues in the majority imply that we have viewed the lockout here, accompanied by temporary replacement of the locked-out employees, as "equivalent" to the "defensive" action of a complete shutdown. On the contrary, we have not made such a characterization one way or the other, because we do not think the question of "equivalence" is relevant. The portion of the statute here involved speaks of discrimination: to find a violation of Section 8(a)(3), some form of discrimination must be found. The only conceivable discriminatory action in the present case, the association-wide lockout has been found privileged by the Supreme Court. To "infer" unlawful discrimination, as does the majority,

[fol. 26] Moreover, the majority appears to overlook the rationale behind the Supreme Court's Buffalo Linen decision. It was therein stated that "the preservation of the integrity of the multiemployer bargaining unit" was sufficient justification for a lockout in the whipsaw situation. Thus, members of an association could require that all employers be struck, if any; partial-unit strikes were subject to being made full-unit strikes by the employer's lockout action. Granting this, it would seem to follow that temporary replacement of the employees in strike status was well within the employers' rights under Mackay.[11] Unlike other possible forms of employer action,[12] temporary replacement is less, not more, than the right of permanent replacement granted in Mackay.

The inequity of the majority's holding becomes evident when contrasted with its holding as to Food Jet, the first employer struck. Food Jet attempted to obtain replacements and is found not to have violated the Act; the other four employers did the same thing, but are found to have acted unlawfully. We can see no justification for thus treating the members of the association differently; in our view, it is not consistent with the Supreme Court's concept of preserving the integrity of the association-wide unit, and unfairly handicaps those employers subject to the threatened whipsaw tactics. They must either

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from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in Buffalo Linen that the discrimination inherent in the original lockout was privileged.

In our view, the Supreme Court's decision in Radio Officers', supra, is not applicable. Where there is discrimination, intent may be inferred, as in Radio Officers', but here there is no discrimination, other than that found privileged by the Supreme Court.

[11] N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, where it was held that any employer could lawfully hire permanent replacements during an economic strike in order to continue his business.

[12] See, e.g., Erie Resistor Corp., 132 NLRB No. 51, where the employer unlawfully granted superseniority to returning strikers and strike replacements.

[fol. 27] wait to be picked off one at a time by the whipsawing Union, or close down completely and cease operating, contrary to their rights under Mackay.

It is misleading to say, as the majority does, that regular employees of the nonstruck members are "willing to work at the employers' terms." These employees are willing only to receive wages while their brethren in the rest of the association-wide unit are exerting whipsaw pressure on one employer to gain benefits that will ultimately accrue to all employees in the association-wide unit, including those here locked out. The choice the majority is giving the nonstruck employers—to ignore the whipsaw or close down completely—renders largely illusory the right of lockout given them by the Supreme Court in Buffalo Linen.

We would reverse the Trial Examiner and dismiss the complaint.

Dated, Washington, D.C. May 4, 1962.

PHILIP RAY RODGERS, *Member*
JOHN H. FANNING, *Member*
National Labor Relations Board

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRANSCRIPT OF TESTIMONY

Carlsbad, New Mexico Tuesday and Wednesday, June 21 and 22, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before: WALLACE E. ROYSTER, *Esq., Trial Examiner*

APPEARANCES: Everett P. Rhea, Esq., General Counsel, appearing for the National Labor Relations Board. William L. Keller, Esq. Clark, Reed & Clark, appearing on behalf of Respondents.

* * *

[fol. 28] ROBERT E. HAMBLEN, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Now, did you have a conversation with the store manager that morning that this lockout began? A. Yes, sir, I did.

* * * *

Q. What were your working hours at that time? A. Eight to five.

Q. Eight to Five? Did you report for work at the usual time that morning? A. Yes, I did. I went up to the door and I walked in with one of the butcherettes that worked in the market and Mr. Howell met us at the door and said there would be no grocery clerks that morning—just butcher employees.

Q. Did he say anything else? A. No, sir, that's all he said, so I just turned and walked away.

Q. Was there anything said at that time about when you would return to work or anything of that sort? A. No there sure wasn't.

* * * *

Cross Examination by Mr. Keller

Q. Bob, on the morning that the union struck Food Jet and you reported to work at Safeway Stores, didn't Mr. Wayman tell you that there was a strike on, that he couldn't permit you to come to work? A. Yes.

Q. And told you there was a strike on? A. Yes, there was.

Q. Did he tell you that Food Jet had been struck that morning? A. No, he didn't, he didn't tell me which store had been struck.

* * * *

Q. When you returned to work were you denied any benefits under the terms of the contract, I mean, were you reinstated with the *senority* that you had earned under the old contract? A. Yes, sir, I was.

Q. You received all the pay benefits under the new contract? A. Yes, sir.

Q. As far as you know you received every benefit under the terms of the new contract? A. Yes, sir.

* * * *

[fol. 29] Q. When you returned to work following the execution of the contract on April 22, 1960, was there much work to be done around the store? A. Yes, sir, there was quite a bit.

Q. Were the stocks on the shelves fairly well depleted? A. Yes, sir, they were and they wasn't done right either. There was gobs and gobs of 'em that weren't marked underneath on a stack display—instead of marking the cans underneath they just set one marked on top of it, see. It wasn't done right.

Q. In other words, what you're telling us, that the stock in the store was in a pretty bad mess when you returned to work? A. It was, yes, sir.

* * * *

MARY PAYTE, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Sometime in March—do you know the date in March on which this lockout started? A. March 16th.

Q. March the 16th, and on that date did you go and report for work as you ordinarily do? A. I reported for work at the usual time.

Q. And who was with you? What other employees were with you at that time? A. The other two checkers—female clerks.

Q. Will you give us their names? A. Lorraine Sanders and Juanita Durham.

Q. Did you on that morning have a discussion with the store manager of Safeway? A. We just knocked on the door for him to unlock it and let us in and I asked him if we were locked out and he said yes.

Q. And who is the "he" now? A. Mr. Howell.
Q. Mr. Howell, and that's Store No. 62? A. Yes.

* * * *

Q. All right. Now, when did you next hear from Mr. Howell, if at all, about returning to work? A. It was the next Tuesday morning, the 26th, he called me at home and asked me if I was working and I told him no and he said well, I'd like to talk to you, so I got ready and went down to the store.

Q. And what was that conversation, please? A. Well, he said, "Mary, if you came back to work, do you think [fol. 30] you could show more enthusiasm" and I said, "what do you mean, you don't think I have been doing my job" and he said, "no, I don't". I says, "well, I had an awful lot of stock and being called to the check stand so much, I know I didn't get all my stocking done".

Q. All right, anything else said at that time? A. Well, he says, "we ran this store for the last five weeks with six employees and I think we can now with eleven."

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Do you know whether or not Safeway Stores have enough volume of business immediately following the strike to put all their employees back to work and keep them busy? A. Do you want my personal opinion?

Q. I'm just asking you if you know? I don't want your personal opinion, I'm asking you if you know? A. I'm pretty sure that they did. If they didn't have enough volume to put the regular employees back to work why did they keep these non-union people at the store working?

Q. When you say why did he keep non-union people in the store, now, what non-union people are you talking about? A. He had people from out of town, Safeway people from out of town that he brought here and they worked.

Q. During the strike? A. During the lockout.

* * * *

WALTER TITUS, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. Can you tell us just what the wording was on the picket sign that was put up at Food Jet? A. It said, "on strike".

Q. And did it name the local beneath the letters on strike—beneath the words, "on strike"? A. Yes, it was stamped on there, Local 462.

Q. What was the rest of it? Local 462, Retail Clerks? A. Yes.

Q. And that's all that was on the sign? A. Yes, sir.

Q. Now, the picket sign—was there a picket sign later placed at the Brown Food Store? A. There was a picket sign later, however it stated, "locked out".

Q. Locked out? A. Yes.

[fol. 31] Q. Was the name of the local immediately under that sign? A. Yes, sir.

Q. Was there also a picket sign used at the Cashway Store? A. The same as Brown's.

Q. The same wording as Brown's? A. Yes.

* * * *

Q. Now, when the lockout began on March 16, were you an employee at that time of Thrifty Way? A. Yes, sir.

Q. And did you have any conversation with anyone there in charge with reference to whether you should continue working or not? A. I went to work that morning and Harold Renfro, the manager of Thrifty Way No. 1 told me that we were locked *our* and ourservices would not be needed until further notice was given.

* * * *

Cross Examination by Mr. Keller

Q. Do you know whether or not Mr. Arnold Crab, owner of Thrifty Way Food Stores is a former union member? A. Do I know it, sir?

Q. Do you know it? A. Through hearsay only, sir.

Q. Has he himself ever told you he is a former union member? I think if you'll recall, he has? A. I believe Mr. Crab has told me that he had belonged to a union—the butcher's union, yes, sir, I believe he did.

Q. And I think that Mr. Crab told you personally that he was not against unions or organization of labor in a discussion that you had with him? A. Yes, sir.

Q. Could you tell me, Mr. Titus, when the union actually took a strike vote? A. As to the date, no, sir.

Q. You are president of this local but you don't know when the strike vote was taken? A. No, sir, I do not keep notes of meetings or any papers whatsoever.

Q. Were you present when the strike vote was taken? A. Yes.

Q. Can you tell us whether or not that they voted to strike all of the members of the Multi-Employer Unit? A. They voted to strike.

Q. They voted to strike them all? A. We just voted for a strike.

Q. But you were negotiating with the Multi-Employer Bargaining Unit? A. What?

Q. Negotiations were between the union and the Multi-Employer Bargaining Unit?

MR. RHEA: Do you know what he's talking about, [fol. 32] Mr. Titus? A. Not really.

Q. Bargaining at that time, sessions were being held between the union and the grocery concerns in Carlsbad to bargain as a unit or to bargain together? A. Yes.

Q. Now did they vote to strike all of the members of the bargaining unit or any one of them? A. Like I repeated, we took a strike vote and it passed. We weren't voting to strike all all or one. We just took a strike vote and it carried.

Q. In other words, at that time, there was no knowledge as to whether or not the union would strike any one of them or all of them? A. That is true as far as I know, yes, sir.

Q. And who was going to make that decision? A. Sir, that was left to the discretion to men more qualified and through our discussions and they came up with an answer.

Q. Who were these men? A. I think Mr. Harold Canon, the Secretary and Treasurer and Mr. Carl Canon and whether or not not Mr. Paul Hansen was in on that selecting I do not know, sir.

Q. But the authority to designate which local concern would be struck was delegated to these people? A. It was left to their discretion, yes, sir.

Q. And they could select any of them or all of them? A. Yes, sir.

Q. Do you know whether or not your—any spokesman for the union contracted any of these grocery employers you were bargaining with and tried to get them to sign contracts individually before the strike? A. Yes, sir. A Mr. Carl Canon.

Q. Who did he contact? A. If I am not mistaken, he contacted Arnold Crab and Food Jet.

Q. And tried to get them to sign individual contracts with the union? A. He tried to get them to sign contracts, yes, sir and later went to Your Food Store with the same understanding and the same procedure as these gentlemen and Your Food Store signed the contract.

* * * * *

Q. Could you tell us, Mr. Titus, what the purpose was in contacting Jet Food and Thrifty Way Food Stores and trying to get them to sign separate contracts? A. What, sir?

Q. What the purpose was in trying to get Jet Food and Thrifty Way Food Stores to sign separate contracts? A. The purpose was sir, that we could get contracts signed. That's what we were after.

Q. Would you tell me, Mr. Titus why the decision was reached to picket *Foot* Jet? A. No, sir, I do not know.

Q. You don't know? A. No, sir.

[fol. 33] Q. You never heard it discussed in any union meeting as to why they selected Food Jet to be picketed? A. No, sir.

Q. Would you tell me what the picket sign said that was placed at Food Jet? A. It said "strike" or "on strike"

Q. Local 462? A. Yes, sir.

* * * * *

Q. But you were told it was hoped that the strike would be over soon and that you would return to work? A. Yes, I was told that, sir.

Q. I will ask you one more question, Mr. Titus. Do you know why it was decided not to strike Safeway? A. Do I know, sir? No, sir.

Q. Never heard it discussed? A. No, sir.

Q. You are president of 462? A. Yes.

Q. Which was the striking union? A. Yes, sir.

Q. Yet your testimony here today is that you do not know why it was decided to strike Food Jet and do not know why it was decided not to strike Safeway? A. That's right. I do not know. The reason I do not know is because I've only been in this local union here about eleven months and I had been on a committee that took a strike vote and from my knowledge of such as that was left up to people that had prior years experience.

Q. It was left up to other people that had prior years of experience? A. Yes, sir and Carl Canon and as far as I know there may have been other people from our local union—some of the older members—I don't know. I think . . . (interrupted)

TRIAL EXAMINER: You have answered the question. You said you don't know? A. Yes, sir.

MR. KELLER: That's all.

Redirect Examination by Mr. Rhea

Q. Who was it made the remark to you they hoped the strike would be over soon? A. If I'm not mistaken, Mr. Harold Renfro.

Q. He is the man you have testified to as being in charge of Thrifty Way No. 1? A. Yes, sir.

* * * *

MR. RHEA: It is stipulated by and between the Respondents and General Counsel that the strike picket [fol. 34] sign placed on Food Jet on March 16th; that on March 17th the lockout sign was placed on Cashway and on March 22 the lockout sign was placed on Brown's Food Store.

TRIAL EXAMINER: Subject to correction and verification, I understand that stipulation is accepted and it is noted.

* * * *

ROBERT SCHOBERTH, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examinaiton by Mr. Rhea

Q. State your name, please? A. Robert Schoberth.
Q. You are with the Safeway organization? A. I am the manager of the Carlsbad District of the El Paso Division for Safeway Stores.

* * * *

Q. * * * Let me ask you another thing. Am I properly informed that certain supervisory people transferred from some of your other stores for example like, I think, Ft. Stockton and perhaps another store or so in that area, that worked with you here during the lockout period? A. Yes.

* * * *

SIDNEY J. BERNARD, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. All right, sir, now with reference to those names who worked during the lockout, now where is this information? A. This information is very similar to the top, at no one time did all these employees—in other words, what we were trying to do was to maintain our stores, outside of Safeway, all of us are just independent operators and we have a big indebtedness and it was decided that we had to maintain the store, otherwise they could pick us off like they did Food Mart prior to us buying Food Mart out, so we had to maintain a Multi-Bargaining

Unit or otherwise we would be picked off. Therefore, after we decided that we would maintain our stores strictly on an individual basis, in other words each store [fol. 35] would maintain his own store—why we had the check here and if you'll notice on the Wednesday we were struck we had only one employee on this date with the exception of one of our managers down at the other store. They are not listed on here. She worked on that Wednesday.

Q. That would be a supervisory person? A. Leora Beavers.

Q. Do I understand the situation to be on her that she came to your store and worked that last day? A. She worked the first day of the strike. She worked on Wednesday and we didn't have anybody to work and we were struck with all that perishable merchandise. Then she continued—she worked on Wednesdays and Saturdays during when we didn't have any help.

Q. She is not listed here at all and is a supervisory person? A. Yes.

Q. Those that are listed then on the group at the bottom of the page worked during the lockout are all the people who worked not as supervisors but as sort of rank and file people? A. No, sir, this Cornelia Karutz, the very first one, she's our day-time manager at a drive-in and then Mrs. Beavers was our night-time manager.

Q. All right, you go ahead? A. The rest of them were mostly sack boys we picked up. If you notice a couple of them worked one day and one worked two days. We were just getting by as best we could.

* * * * *

Cross Examination by Mr. Keller

Q. Did any of you employers—did any of your employees report to work on the morning of March 16 which was the day of the strike of the Retail Clerks Union commenced? A. Not to my knowledge, no, sir.

Q. Did any of them ever report at any time during the strike? A. No.

Q. Have all your employees who have asked for reinstatement after the termination of the strike been reinstated? A. Yes.

Q. Are they receiving all benefits applied for under the terms of the contract negotiated on April 22, 1960? A. Yes.

Q. Are these employees who were employed after the strike commenced employed as temporary employees? A. Yes, sir, and they were let go immediately that Monday morning—that Saturday night. Mr. Carl Canon called and said as you know the strike is over with and he said some of your employees are available and some [fol. 36] are not—he said that we agreed in the multi-employer unit that starting Monday your employees will commence working and he said outside of your store manager will be only one there and that's all we had.

Q. Were you contacted the night before the strike by any union individual—representative with reference to signing an individual contract? A. Yes, sir, Mr. Carl Canon as representative of *International* Clerks 462 came by the store.

Q. And what did he say to you? A. He said that this was the last chance for us to sign a contract, that there was going to be a strike tomorrow and he indicated if I was going to be a sucker and let Safeway sucker me into this and would Safeway pay my bills if we were struck and I said, "no, sir, they wouldn't", and then he took another approach and went on to tell me about super market in Denver and Trinidad and said how they made their first million by signing a contract while Safeway and the other grocers were on strike and I referred him to Mr. Jones who was our multi-bargaining agent and then he went back to the back room with our Vice-President and discussed a little more pros and cons about it and our Vice-President who was former president of the machinists union and—he's been a very strong union man. My father was a union carpenter and my brother is a union electrician. In fact, my father was a union steward and we are not against at all collective bargaining. I think it is one of the best things that ever happened to this country.

Q. Was Mr. Lenn Jones authorized to represent you in any respect other than the collective bargaining for a new bargaining contract? A. That was all that he was authorized to do.

Q. Was anybody ever authorized to represent you with respect to how your stores would operate—your store would operate during the period of the strike? A. No, we were on our own.

Q. Was there ever any discussion among the members of the Multi-Employer Bargaining Unit as to how each member of the unit would operate his store or stores in the event of a lockout or strike? A. Yes, sir, after the Multi-Bargaining Unit decided that it was a threatened strike and in order for us to keep from being picked off one by one it was decided then that a strike against one would be a strike against all.

Q. Was there ever any cooperation between any of the stores who were members of the Multi-Employer Bargaining Unit with respect to the operations of their stores after the strike commenced? A. No, sir.

[fol. 37] Q. Did each member of the Multi-Employer Bargaining Unit from the beginning of the strike act independently of each other? A. We acted independently of each other.

* * * *

Redirect Examination by Mr. Rhea

* * * *

Q. Yes, sir. Now, on the morning of the strike, on March 16, did you have occasion to call the other members of this Multi-Employer Unit, such as Safeway and Brown and Cashway and Thrifty Way and advise them of the picket on your establishment? A. Yes.

Q. And did you talk to each one of them in turn that I've mentioned here—Safeway, Cashway, Thrifty Way and Brown? A. They were advised. I didn't personally advise all of them.

Q. I'm having a little trouble reconciling that with your testimony that each man was on his own during the strike? If each store was on its own why did you take the time to call the other members of the Multi-Employer Unit? A. Why did I?

Q. Why did you do it? A. Well mainly because how would they know that they were on strike aftey they had been told that a strike against one was a strike against all?

Q. Now, if the strike had occurred first against Cashway, for example, were they to in turn have called you and told you a strike—a picket had been placed there? A. As far as I know.

Q. Had there been prior meetings among respective store members of this unit that if a strike was placed on one store that each of the stores would lock out the employees in each of the remaining stores? A. Right.

Q. Was that not the purpose that you called each of the other members about on that occasion on March 16th? A. Well, now we didn't—let me correct that—it wasn't a lockout, it was a strike.

Q. Let's call it a strike. If the strike had occurred with reference to one of the other stores, would you not have locked out your employees at your sore? A. I would.

* * * *

JOHN H. BROWN, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

[fol. 38] Direct Examination by Mr. Rhea

Q. State your name for us? A. John H. Brown.

Q. You are connected with what Food Store in Carlsbad? A. Brown's.

Q. Can you tell us based on your examination of your books the names of the people—first of all who were working in your store immediately prior to the lockout on March 16th? A. Yes, sir. Our accountant got this letter and it was Juanita Blanchard, Bernice Turnbow, Lupe Viscano and Jerry Brooks.

Q. Those were your regular clerical employees who belonged in this unit at that time? A. Correct.

Q. All right, now, beginning on March 16, they were locked out, I take it, is that right? A. Yes.

Q. All right, each of these you've named? A. Yes, sir.

Q. Then can you tell me those who worked in their absence from March 16 to April 22—doing the same kind of work that they were doing? A. Now this would not be full time because they—my wife and my partners wife worked some too. Oleta Shaffer—assistant manager's wife worked a total of four days. Eulojia Aguilar—he worked the entire time of the strike as a sack boy as a transfer from the other store in Loving. Gloria Burba, the market manager's wife worked a total of four weeks.

Q. Have you given us all the employees now that worked during the lock-out period? A. As far as I can recall and shown on the payroll records. This doesn't count my wife and partner's wife who received no pay whatsoever.

Q. Well, I want the names of everybody who performed services for you during the time whether they received pay or not who were actually non-union employees. Now, as far as I'm concerned, I might explain to you, I don't care whether they are relatives or who they were, but I would like to have their names, whoever they are? A. My wife normally works in the office, she works some out in front and some in the office.

Q. Her name? A. Noma Brown. Approximately half time on the floor as a checker and half time in the office where she regularly works and Anna Belle Gossett, worked the other half of the time in the office. The other partner's wife at the store in Carlsbad.

Q. I understand you have two stores in Carlsbad only? A. No, one in Loving and one in Carlsbad.

* * * *

Q. Did you have a conversation with them with reference to their working on that date? A. Let me make one correction here. One of the girls was on her day off but [fol. 39] she called in. Now, I brought them in the office and told them that we were involved in a labor dispute and were on strike and that I hoped it would be over soon and could call them back to work.

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Would you tell us what your capital investment is?

MR. RHEA: If the Examiner please, I can't see the relevancy of this.

MR. KELLER: Mr. Examiner, I'll put it this way, the relevancy of this question, that part of our defense is this strike or lockout *of* whatever you wish to call it is that these small independent grocers who had their life-time capital investment in their business that they were operating under a capital indebtedness and were handling perishable food stuff and that it was absolutely necessary for them to continue the operation of their stores during the period of the strike or lockout.

TRIAL EXAMINER: But of course the law is clear as to the fact that an economic necessity does not justify a violation of the law or excuse it. Whether it was or would have been an economic disaster for them to operate otherwise—I sustain the objection.

MR. KELLER: Could I offer proof?

TRIAL EXAMINER: Certainly.

MR. KELLER: We would prove through this witness that he has a large lifetime capital investment, which represents his lifetime earnings in this business; that he is operating under a current heavy indebtedness; that his grocery store handles perishables and food stuffs; that he could not operate or continue in business if he was permitted to be struck for a long period of time.

TRIAL EXAMINER: All right, the offer is rejected.

* * * *

Q. Could you tell us when the decision was reached between the members—employer members of the unit to send their employees home in the event that any one of [fol. 40] them was struck? A. Yes, I believe at a meeting at Hobbs, New Mexico on February 20th that agreement was reached by the employer bargaining unit.

* * * *

Q. Did anybody approach you relative to signing a separate and individual bargaining agreement during the period of the strike? A. Yes.

Q. Who approached you? A. William Smith, Assistant Regional Director, AFL-CIO, Storeworker's Union.

Q. When he approached you was he by himself or with a committee? A. No, I believe they call themselves the Central Trade Union at Carlsbad, was with him.

Q. Where did he contact you? A. At my store.

Q. What did he say to you? A. He asked if he could talk with me concerning a separate contract and I told him I was a member of the Multi-Employer Bargaining Unit and that Mr. Jones was handling it and he told me I was letting Safeway make a sucker out of me. He also said he was from back east and there were ways and means of forcing me to sign a contract other than the union pressure and I told him I didn't believe it would be morally right to sign a separate contract when I had given the other employers my word and he said—he informed me that morals were made from day to day, subject to change and I told him I believed he was on my lunch hour and I was going to lunch.

* * * *

Q. Did you authorize Mr. Lenn Jones to act on your behalf in any respect other than negotiations of a new bargaining agreement with the Retail Clerks? A. Just for bargaining with the Retail Clerks only.

Q. Have you authorized any other person to act on your behalf with respect to the manner your store would be operating during the period of the strike? A. No, sir.

Q. Did you reach any agreement with any member of the Multi-Employer Bargaining Unit as to how stores would be operated as a unit during the strike? A. No, sir, we each acted independently as best we could.

Q. MR. KELLER: I think that's all.

Redirect Examination by Mr. Rhea

Q. Mr. Brown, I'm not sure I understand—this man Bill Smith who contacted you about signing an agreement, could you identify him for us? A. I think I have his card somewhere in my billfold. Mr. William J. Smith, Assistant Regional Director, Washington, D. C. Phone—office phone, Reg. 18. Office in Phoenix, Arizona.

* * * *

[fol. 41] TRIAL EXAMINER: On the record.

STIPULATION OF COUNSEL AND EXHIBITS RECEIVED

MR. RHEA: It will be stipulated by and between counsel for and each of the respondents, counsel for the General Counsel as follows: That some of the members of the grocery industry in Carlsbad, New Mexico, have negotiated a collective bargaining agreement on a multi employer basis for many years during which time successive contracts have been entered into with the Union; that each of these contracts has contained a union shop clause; that *duirng* the time of negotiations on an industry wide basis there has not been a single unfair labor practice charge filed with the NLRB against any member of the multi employer bargaining unit nor has there been a single arbitration case; that during this period of years of collective bargaining negotiations, relations between Union and members of the *mulit* employer bargaining group have generally been very good; that each employer member of the multi employer unit with exception of Safeway Stores, Inc., voluntarily recognized the Union as the bargaining agent for its employees without the necessity of an election being held under the direction of the National Labor Relations Board; that there has never been any refusal on the part of spokesmen for the multi employer bargaining unit or on the part of any member thereof to meet with the Union and discuss matters arising out of the terms of any bargaining agreement that has heretofore existed prior to bargaining meetings of 1960 between the members of the Multi-Employer Bargaining Unit and the Union. On September 17, 1959, the Union gave notice that it requested additional bargaining and at that time submitted a copy of its proposed changes in the old agreement which was to expire shortly and this letter of re-opening and the proposed changes in that bargaining contract have been marked and are incorporated herein and made a part hereof, namely, as GC 2-A and GC 2-b; that approximately three of the notices to reopen the contract were mis-directed by Mr. R. L. Coulson, Union business representative and were not received by the proper employer in time to constitute a valid open-

ing under the terms of the contract then in effect; that however, the members of the multi-employers bargaining unit have waived this failure to properly open the terms of the contract which expired on December 1, 1959 and have, as heretofore set forth met and bargained with the Union; that a copy in duplicate is entered of the old contract which comes in two parts, the first part marked as an exhibit, GC 3-A, a copy of the contract with Safeway expiring December 2, 1959; and an Exhibit marked GC 3-B, which is a copy of the individual contract, signed with all other Respondents other than Safeway, which [fol. 42] expired on November 25, 1959. * * * Mr. Lenn Jones represented not only his company, Safeway, but was authorized by separate letters hereinafter identified to represent all the other members of the multi-employer bargaining unit in regard to the negotiation of a new collective bargaining contract; that there was bargaining on a multi employer basis in the grocery industry in Carlsbad since approximately 1948. Successive contracts have been negotiated on a multi-employer basis with the Meat Cutters Union dating back to 1948. There has been bargaining on a multi-employer basis in *Carlsabd* with retail clerks dating back to at least 1957, during which time three successive collective bargaining contracts have been entered into. Each of these three contracts contain a union shop clause. Safeway has negotiated with the retail clerk's union in Carlsbad since approximately 1950 and has since that date entered into five collective bargaining units with the retail clerks' union, all of which include a union shop provision. At the first bargaining meeting which was held on January 15, it was understood between the members of the multi-employer unit and the union representatives there present that Mr. Lenn Jones referred to above who handles industrial relation matters and collective bargaining for Safeway was authorized through separate letters to speak for the other members of the multi-employer unit.

* * * At this meeting on February 17, 1960 all portions of the new contract were agreed to except wage increases and the retroactivity of the wage increases. At the negotiating session on April 21, 1960, an agreement

between the members of the multi-employers' unit and the union was reached at approximately 1:30 in the morning. * * * At the negotiating session on March 2, 1960, the Union advised the members of the multi-employer bargaining unit that a strike vote had been taken and that a strike had been authorized. The Union did not advise when the strike would take place or which members of the employer unit would be struck or if all would be struck. The members of the multi-employer unit advised the union at the March 2, 1960 meeting that—and further advised that they would not permit the Union to pick them off one at a time and put out of business each employer like they had done with Food Mart. Food Mart was a Carlsbad Grocery Company which went out of business in 1959 following a strike by the Retail Clerks' Union. The night before the strike Carl *Cannon* contacted Sidney Bernard of Food Jet and Arnold Crabb of Thrifty Food Stores and attempted to get them to sign individual contracts like the contract Your Food Grocery Company had [fol. 43] signed. Your Food Grocery Company is not a member of the Multi-Employer Bargaining Unit. They did not present the contract that Your Food Store allegedly signed. GC-Exhibit 11 is a telegram sent by Harold Canon as Secretary of Retail Clerks Local Union 462, to Mr. Lenn Jones, branch manager, Safeway Stores, Inc., Industrial Relations Division at 8:20 A.M. on March 16, 1960, the morning the Union struck Food Jet. This telegram was read to Mr. Jones in Midland, Texas, at 10:30 A.M. on March 16, 1960. GC Exhibit 12 is a telegram sent by Harold Canon, Secretary of Retail Clerks Local Union No. 462 to Mr. Lenn Jones, Safeway Stores, at 12:49 P.M. on March 16, 1960. GC Exhibit 13 is a telegram sent by Mr. Lenn Jones, group spokesman for the Multi-Employer Bargaining Unit to Mr. Paul W. Hansen, Third Vice-President of the Retail Clerks International Union at 8:40 A.M. on March 18, 1960. GC-14 is a telegram sent by Lenn Jones, group spokesman for the Multi-Employers Bargaining Unit to H. H. Atkins of the Federal Mediation and *Concilliation* Service at 8:40 A.M. on March 18, 1960. That completes the situation up to this point. This stipulation is limited to the

fact that the individuals whose names appear hereon who are employes of the members of the Multi-Employer Bargaining Unit are in fact, members of the Union;

[Thereupon the documents heretofore referred to were marked as GC Exhibits 2-A 2-B, 3-A, -3-B, 4, 5, 5-A, 5-B, 5-C, 5-D, 6, 7, 8-A, 8-B, 8-C, 11, 12, 13, 14, for identification].

* * * *

TRIAL EXAMINER: The stipulation is noted and General Counsel's Exhibits as offered in the stipulation are received.

* * * *

ROBERT SCHOBERTH, a witness, called by and on behalf of General Counsel, having been previously sworn upon his oath, was examined and testified as follows:

Direct Examination by Mr. Rhea

Q. Mr. Schoberth, you testified here yesterday I believe and were sworn and under oath at that time? A. Yes.

Q. You are still under oath today. We started to examine a list of employees who you were requested to furnish who are employees of your company during the peri- [fol. 44] od of this lock-out or strike. Since that time have you been able to examine this list further. Can you tell us now the names of the people who worked for you during this period? A. Yes.

Q. Would you like to use the list and explain? A. I grouped the employees from this total list of 60 names and several classifications would be similar.

TRIAL EXAMINER: These people who work in Store 62 or 43? A. They are designated on my list. The first list I have are employees who were present at the beginning of the strike at Safeway Store #43 Halagueno. Tom Hernandez, Tony Matta, Wanda McClarey, Virgie Hartley, Johnnie Wilson—Jimmy Wilson, that is, Reuben Carasco, Clarence Blackburn, Eutimio Navarrette, Carl Smith, John Julian.

Q. Now, can we follow that with a list of the people who worked during the lockout, the lockout itself, after these people were locked out on March 16th? A. Yes, sir, but they are not designated by store.

Q. Well, at this point, let me ask you this: On March 17, for example, was Store 43 still open on that date, that would be after the lockout began? A. No, sir, it was not.

Q. Your report necessarily relates these people who were employed here only at Store 62? A. Safeway Store 43 was closed for a period of nine operating days.

Q. Nine days? So for the first nine days your list now refers to employees at Store 62? A. That is correct.

Q. After that date it would refer to both 43 and 62? A. Yes, sir.

Q. All right, due to that explanation, go forward with those—list those who were working for those two stores during the lockout period? A. I still have the list of 62. You don't want to get into that yet?

Q. Well, you are reading those who worked for 62 prior to the lockout? A. Correct.

Q. All right, go ahead? A. Glen Pike, Harold Canon, Vance Garner, John Kimberly, Juanita Durham, Flora Sanders, *Ramond* . . . (interrupted)

* * * *

A. Raymond Methola, Dale Peden, Mary Payte, Herman Bradshaw, Robert Hamblen, Ronald Bartholomew, Charles Hinkle, David Tuttle, Kenneth Chapman, Allen Shahan, Grady Enger.

Q. Is that the complete list? A. That's a complete of employees that were present before the strike at both Safeway Stores 62 and *42*.

[fol. 45] Q. All right, sir, now, is it possible for you to separate for us the employees who worked during the first nine days of the lockout from those who worked after that date,—if it isn't, just tell us? That would be the period when you combined both stores as I understand it and closed 43? A. Yes, I can do that.

Q. All right would you do that for us first? Now, this would be the group that worked at 62 during the first nine days? A. These are Safeway store managers from other

areas. Verdis Pack, Viron Wallace, Dale Spears, Howard Holder, Richard Thompson, Carl Lorey, John Coldwell. These are people we brought in. I now have some names of people who were hired locally. They were all in the box boy classification.

Q. Those which you have just named were brought in from other stores? A. Yes.

Q. This that you are about to name are people who were box boys who were hired at that time? A. Temporary employees.

Q. Thank you? A. Freddie Prewitt, Robert Freeman, Perry Andrews, Juan Lujan. That is the complete list. During the first nine days.

Q. Do you know—can you now add to that please those who worked for both stores after the first nine days? A. Yes.

Q. All right? A. John Crunk, William Butler, Robert Gonzalez, Raymond King, James Cantu, Charles Bentley, Everett Evans, Charles Borcherding, Clarence Stahl, Joyce Nix, Willia Ratliffe, Joe Venegas, Rolle Shaw, Gary Glover, E. Alvarez, Ramon Muniz, Orville Dunaway, S. E. Torres. That completes the list.

Q. This would cover the employment up to the date of April 22, 1960, is that correct, Mr. Schoberth? A. No, sir; these are still—well, I'm sorry—I missed some. May I add some.

Q. Yes, what is this you are adding? A. These are people hired locally as temporary employees who were hired after the first nine day period.

Q. After the first nine day period? A. Yes.

Q. And you're adding to that list now? A. Correct.

Q. All right, thank you. A. Billy Upton, Wayman M. Howell, Tommy Martinez, Richard Franko, James Floyd, Clayton Fike, Walter Wright, Severo Ortiz, Ricardo Vidal, Robert Shirley. That is the complete list.

Q. All right, thank you. Now, Mr. Schoberth, can you tell us if any of these employees which you have here named, including, of course, the list of people during the first nine days and all those who worked from the expiration of nine days and up to April 22, if any of those people [fol. 46] continued to work for you after April 22, is it possible to designate that closely, or are you able to do

that? A. Well, the people who were brought in from other areas all went back to their respective jobs in that specific store. They are all presently employed.

Q. Are presently employed but not necessarily at that store? A. But not necessarily at the Carlsbad store. They came from various stores in the area that I cover and they have since returned to that store.

* * * *

Cross Examination by Mr. Keller

Q. Mr. Schoberth, can you tell us whether or not Safeway sent home on the morning of the strike all employees who were in the bargaining unit? A. Yes.

Q. When was the decision made to send home all the employees in the bargaining unit in the event of a strike? A. We met at Hobbs the latter part of February—the last Saturday in February, I believe. Most of the employers met at Tootie's—Tootie Schnaubert's Cashway there and at that time it was decided that in the event of *a* economic strike that a strike against one would be considered a strike against all and any action taken against one—the rest or remaining part of the group would send all employees home.

Q. Why was this decision reached? A. We felt that we couldn't be placed in the position of being picked off one at a time. We had to present the same united front that the union was presenting toward us.

Q. Did—what did you tell your store managers to tell the employees if there was a strike at any store who was a member of the Multi-Employer Unit? A. They were instructed that in the event of a strike against any of the unit that they were to inform the employees to go home, that they would be called back when there was a job available again.

Q. That is following the strike? A. Following the strike, yes.

* * * *

Q. Could you tell us, sir, whether Safeway has a joint company employee insurance plan? A. Yes.

Q. This plan was continued during the period of the strike? A. Yes.

Q. You have previously testified that people from other Safeway stores in other towns in this area were assigned to the Carlsbad store during the period of the strike. Were they temporarily assigned here? A. All of them were temporarily assigned. One list of approximately 9 or 10 names were store managers from other areas, who [fol. 47] would of necessity had to have been temporary employees.

Q. Now, how long the store managers each work in the Carlsbad store? A. Generally we assigned them for a day—three-day period. There was three exceptions who worked four days.

Q. Were the assistant store managers also similarly assigned for short durations? A. All but two were here for a four-day period. Four-week period—those were generally assigned for a one-week period.

Q. When the strike was over was the stock in the store in rather bad shape? A. The stock was consistently in rather bad shape during the strike.

* * * *

Q. Could you *well* us, sir, whether the store manager and assistant store managers that were temporarily transferred into Carlsbad stores during the strike were supervisors? A. Yes, they were supervisors.

* * * *

Q. (By Mr. Keller) the box boys which were hired locally, were they for the most part young highschool and *junion* highschool boys? A. For the most part they were young boys. Some were not in highschool. They were available on a full time basis.

Q. Some were part time and some were full time box boys? A. Yes, sir.

Q. Would some be regular, full time or part time and some not regular full time and part time employees? A. They were all termed as part time employees. They were all hired as temporary employees.

Q. Can you tell us what job duties were of the employees who *were* hired locally as temporary employees. A. Well . . . (interrupted)

Q. That were classified other than as box boys? A. The only employee that we hired in a classification other than box boy was Walter Wright. He was hired as a Food Clerk. His duties consisted primarily of stocking and carrying boxes out or working as a box boy.

* * * *

WAYNE ALLEN DISNEY, a witness, called by and on behalf of General Counsel, being duly sworn, was examined and testified as follows:

[fol. 48]

Direct Examination by Mr. Rhea

Q. Will you state your name for us, please, sir? A. Wayne Allen Disney, Tootie's Cashway manager.

Q. You are manager in Carlsbad? A. Yes, sir.

Q. Now do you have available to you and at your fingertips the names of the employees who were working in the clerical unit for the Cashway Store in Carlsbad immediately prior to March 16 when this strike or lockout began? A. Yes, I do.

Q. Can you give us those names, please? A. You mean regular employees?

Q. That is regular employees before this all began? A. Charles Blackburn, Bobby Bars, Dwayne Compton, Jo Nell Cox, Wayne Disney, Charles Davis, Danny Dunning, *Geverly* Fletcher, Ray Fletcher.

* * * *

A. Charles Healer, Bobby Johnson, Alfredo Lira, Jesus Lira, Wayne Modrall, Janie Roberts, Weldon Stafford, O. J. Smith, Dorothy Titus, Gary Watkins.

Q. Can you tell me about an employee named J. H. Carbell, are you acquanted with that individual? A. Yes, sir.

Q. They were not employed prior to the lockout? A. He was, his name is not down there, I'm sorry.

Q. He should be added to the list? A. Yes.

* * * *

Q. All right, can you tell us please, the names of the people who were in your employ immediately after this deadline date of March 16, and who continued from that time forward to work in the same unit doing the same kind of work—after the lockout or strike—well, during the time of the lockout—I guess we're going to use that term. March 16, 1960 to April 22, 1960, is what we're trying to reach. A. If you'll excuse me, I'll ask a question?

* * * *

A. You want them now that worked during the lockout period?

Q. Right? A. Wayne Disney, Ivan Folson, Fernando Lira, Mike McDonald, Robert Tachezo, Hazel Wilson, Steve E. Schnaubert.

Q. Where does Mr. Steve Schnaubert ordinarily work? A. He is our personnel manager in the general office.

Q. He normally works in Hobbs, is that right? A. Yes. Helen E. Schnaubert, Steve E. Schnaubert, Jr. Bill Roberts, Douglas Wilson, Doug Buckner, Joe Bishop, Eunice L. Fuller, Charles Lyons, Norma Wright, John Webb, Robert Shirley, Johnnie Vanegas, Ivan Winifred. [fol. 49] Q. Now, Mr. Disney, do you know of your own knowledge who of these people in this list were actually a supervisory people, either in your store or in some of the other Cashway stores? A. Yes, sir.

Q. Can you tell us their names, please? A. Steve E. Schnaubert, Bill Roberts.

Q. What capacity did he occupy before that lockout, do you know? A. He is manager of Cashway No. 6 in Hobbs.

Q. All right, sir? A. Doug Wilson.

Q. All right, what position did he occupy previously? A. He is manager of Cashway No. 1, Hobbs.

Q. All right? A. Doug Buckner who is produce supervisor.

Q. At what store? A. He was over all six stores in produce—in the buying of the produce and general pricing.

Q. All right, sir? A. Joe Bishop.

Q. All right? A. He was manager of Cashway No. 3 in Hobbs.

Q. All right, sir? A. Eunice L. Fuller who was assistant manager of Cashway No. 1 at Hobbs.

Q. All right? A. Bob—Charles Lyons who was manager of Cashway No. 2 in Lovington, New Mexico. John Webb, Assistant Manager of Cashway No. 3, Hobbs.

Q. That is the completed list?

TRIAL EXAMINER: How about Wayne Disney? A. Manager, Cashway, Carlsbad.

Q. And you worked throughout the lockout too, did you not? A. Yes.

Q. The other people that you have not named, are what we might consider rank and file people who worked in the clerical unit during the time of the lockout—is rank and file a good term? A. Yes, sir, its the last names that I gave you.

Q. I am trying to focus now for just a minute on those that you haven't just previously named, in other words, those that you've designated who are non-supervisory—that that you didn't name were rank and file clerical people who worked in this store during the lockout? A. Yes, worked and came from other stores. I believe three came from our other stores in Hobbs.

Q. Well, I suppose you are now telling me that some of these people worked as clerks probably in the Hobbs stores and they came over and helped you out during the lockout, is that correct? A. Yes, sir.

[fol. 50] Q. Let me ask you, of your own knowledge, do you know over *wht* period of time the people continued to come over who were supervisory people from Hobbs and helped you during the time of the lockout—in other words, was there a period of several weeks when they came over after that time and you operated fairly well on your own with your local people here? A. No, sir. These people—I can't give you the exact dates or what they worked here, but they did come over through the whole strike.

Q. Throughout the entire period, the entire approximate five weeks? A. Yes.

* * * *

Cross Examination by Mr. Keller

* * * *

Q. Did you talk to your employees on the morning of the strike? A. Yes, by phone.

Q. Did you talk to any of them personally? A. Yes, I did.

Q. What did you tell the ones that you talked to in person? A. You mean after the strike?

Q. After the strike commenced? A. Told them that Mr. Sid Bernard had called me about nine o'clock that morning and they had struck Food Jet and I think they were told, as our employees came to work, I told them that a strike against one was a strike against all and to protect the Multi Bargaining Unit. I told them that I—individually I talked to them as they come to work and told them that I hoped that it would be over with soon and they would be notified when to come back to work.

* * * *

Q. Did you pay employees who requested to be paid their vacation benefits during the period of the strike? A. Yes, sir.

Q. Could you tell us whether or not the company insurance plan for these employees was kept in effect during the strike? A. It was.

* * * *

Q. Could you tell us whether or not all of your employees were returned to work following negotiations of the contract on April 22nd? A. They were.

Cross Examination by Mr. Keller

* * * *

Q. Could you identify Mrs. Helen Schnaubert for us? A. Yes, sir.

[fol. 51] Q. Who is she? A. She is the wife of Steve E. Schnaubert.

* * * *

Q. Could you tell us what her relationship to Mr. Steve Schnaubert was? A. His wife.

Q. Could you tell us the functions, if any, she performs within the Schnaubert organization? A. She is cashier at Cashway No. 1 in Hobbs. She is second from our head bookkeeper. She takes the duties over of our head bookkeeper when she is on vacation or sick.

Q. Does she authorize payroll checks? A. She can, yes, when she is performing duties of our head *bookeeper*.

Q. Do you know from your own knowledge whether or not she has access to company personnel records? A. Yes, she does.

* * * *

Q. Could you identify for us Mr. Steve Schnaubert, Jr.? A. Yes, sir. He is the son of Mr. Steve Schnaubert who is personnel manager and general manager of the Cashway organization.

Q. Could you tell us whether or not Norma Wright who worked in the Carlsbad store during the period of the strike normally works in Store No. 1 in Hobbs? A. Yes, she does.

Q. She is temporarily assigned here to work during the period of the strike? A. Yes, sir.

Q. Could you tell us whether or not or could you identify for us rather, Mrs. Douglas Wilson? A. Yes, sir.

Q. Is she related to anybody with Mr. Schnaubert's organization? A. She is the wife of Doug Wilson who is manager of Cashway No. 1 in Hobbs.

Q. Could you identify for us Mr. Fernando Lira? A. Yes, sir.

Q. Who is he? A. He is—(interrupted)

Q. I am speaking of the one who was hired as a temporary employee during the period of the strike? A. He is the son of the produce manager at Cashway No. 4 in Carlsbad.

Q. Is he a young highschool boy? A. Yes, sir.

Q. Could you tell us who Mr. Robert Pacheo is? A. He is a boy who was home on leave from the Navy and had worked for Cashway in Hobbs when he was going to school prior to going into the Navy and he worked part time while home on leave.

Q. And would you identify Johnny Vinegas for us? A. He is a school boy here in Carlsbad who came in seeking employment after the strike had started.

Q. During the period of the strike did you ever solicit outside help or new employees? A. No, sir.

* * * *

[fol. 52] ARNOLD CRAB, a witness, called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rhea

* * * *

Q. What stores, please, sir, are you connected with in Carlsbad? A. I am the owner of Thrifty Way Food Stores 1, 2 and 4.

Q. One, two and four? I take it there's no three at this time or is there? A. No, that has been closed up.

Q. Well, can you, Mr. Crab, Please, sir, as the owner of the chain, give us at this time, the names of all of your employees in the clerical unit who worked at your stores immediately prior to March 16 which was the date, of course, which this strike or lockout began? A. Well, I can give it to you by the stores.

Q. All right, sir, I think that'll be fine.

* * * * *

Q. * * * This will name all the employees now who worked for you prior to this period, March 16th? A. All right, sir. Joe Vasquez, Clerk, Donald Andrews, Sack Boy, Robert Cummings, Clerk, Belle Coulson, Clerk, Walter Titus, Clerk, and there could be some part time sack boys—could be Robert Willis and Edwin Phillips.

Q. Robert Willis and Edwin Phillips? A. Yes, sir.

Q. All right, now, that includes all of them that were employed in the clerk category prior to March 16th? A. Yes, sir, No. 2 Store, John Pirtle, Clerk, Aleen Eggleston, Clerk, Hirschell Skaggs, Clerk, Tommy Lawson, Clerk, William Langlitz and Gary Niblett, an irregular part time sack boy. No. 4 Store, Eddie Razo, Clerk, Ray Navarette, Milton Moore, Clerk, Vonda Narramore, Clerk, Mike Wyley, Clerk, Terry Tidwell, sack boy, Stanley

Davis, Clerk, Douglas Prior, box boy, Terrell McBee, box boy.

* * * * *

Q. All right, sir, now that completes the list of all those who were with you prior to March 16 lockout or strike, whichever you want to call it? A. Yes.

* * * * *

TRIAL EXAMINER: I understand the witness has given us the names first of No. 1 store and No. 2 store? A. And No. 4.

[fol. 53] Q. I am correct am I not that these were the people that worked prior to November 16th? I mean March 16th? A. Yes.

Q. Now can you take us to the next category, those who worked for you during the period of this lockout? A. The way I understand it, *its* not supervisory personnel would be listed in this?

A. Well, do you have the supervisors with you here now? A. No.

Q. You do not have? A. No.

Q. All right, so this will only include the rank and file of clerks and not supervisors, is that right? A. Yes.

Q. All right, go ahead. A. At our No. 1 Store, Robert Willis, box boy, Edward Phillips, box boy, Ronald Mourer, box boy, Alvin Rouse, box boy, Ashley Burns, Clerk, Wendell Smith, box boy. Since then some of the boys have quit. That's just some that worked irregular part time box boys.

Q. Those that quit, they were replaced by other people, is that what you're trying to tell us? A. No, sir, that's the total amount.

Q. That's the total number of those who were replaced or what have you? A. Yes, sir.

Q. All right, sir? A. And No. 2 Store, Gary Niblett, irregular part time box boy. That's all the employees.

Q. The only employees, the implication being there that everybody else was a supervisor who worked at No. 2 Store during the lockout? A. Yes, I worked there myself.

Q. And everyone else who worked there was a supervisor? A. Well, now, the manager's wife, but she wasn't paid.

Q. We'd like to have her name too. A. She relieved for lunches and all that.

Q. Anyone who worked there during that time, we'd like to have their names? A. Mrs. Clyde Brooks.

Q. Mrs. Clyde Brooks. Now we have reached this point, have you also excluded any persons who are relatives who worked at No. 1 Store or have you included them in the list you have given us? A. No, sir, no relatives.

Q. No relatives at all? A. No, sir.

Q. Were there any other persons now other than Niblett and Brooks that worked at the No. 2 store during this time, except supervisory people? A. No, sir.

Q. I have the name of an employee named Donald Stahl, do you know whether or not he worked during this time. A. I haven't got to that No. 4 Store yet.

Q. I'm sorry. Thank you. A. No. 4 Store, Addie Black, Clerk, Don Stone, Clerk, Guy Brazill, box boy, [fol. 54] Robert Jesse, box boy, Linda Jesse, Clerk. Ted Crawford, box boy, Odie Russell, box boy, Gilbert Barns, box boy.

Q. That completes the list does it not for all three stores? A. My wife did work for No. 4 Store.

Q. And her name is what, please? A. Laura Ellen Crab.

Q. Had she been an employee prior to this time in your store? A. Yes, sir.

Q. Now how about—did you have an employee there by the name of Lee Gruber? A. Yes, he works in the market.

Q. In the market? A. Yes.

Q. He didn't work as a clerical employee during that time? A. Possibly part time, yes, sir.

Q. Is he ordinarily a supervisory employee or is he rank and file employee in the meat department? A. He ordinarily works in the meat department, yes, sir.

Q. Not as supervisory? A. Yes, sir.

Q. All right, Lee Gruber then should be added to the list should he not? A. (no answer)

Q. How about Royce Black? A. He's market manager. Market supervisor. No. 4.

Q. And Carl Jesse, did you have a Carl Jesse working there at that time? A. That's my manager.

Q. Your manager? A. Yes.

* * * *

Q. Now when the strike was called off on April 22, did you immediately return all of these employees to their jobs there who had worked for you prior to March 16th? A. Yes, with the exception of people who wanted off to attend to business.

Q. That would include all the people whose names you have given me here first with reference to all three stores? A. Yes, sir.

* * * *

Cross Examination by Mr. Keller

Q. Mr. Crab, did you enter into an agreement with the other members of the Multi-Employer Bargaining Unit to consider a strike against any member of that unit to be a strike against all? A. *yes*, sir.

Q. Would you tell us where you were when you entered into that agreement? A. It was on February the 20th at Hobbs, New Mexico at Tootie's Cashway No. 1 Store.

Q. Had you all discussed the possibility of entering into such an agreement prior to that date? A. Yes.

* * * *

[fol. 55] Q. I think you have testified that you had two box boys who worked, I'll say that you had several box boys who worked—irregular employees, is that correct? A. Yes, sir, they were irregular part time sack boys.

Q. These employees were not covered by the bargaining unit? A. No, sir.

Q. *were* they permitted to work during part of the period during the strike? A. Yes, sir.

Q. Had you authorized Mr. Jones or any other member of the Multi-Employer Bargaining Unit to represent you in any manner or capacity whatsoever other than the negotiation of a new collective bargaining contract? A. No, sir.

Q. Did you enter into any agreement with any members of the Multi-Employer Bargaining Unit as to how you would each operate your stores during the period of the strike? A. No, sir.

Q. In operating your stores during the period of the strike were you acting independently of each and every other member of the Multi-Employer Unit? A. Yes.

Q. Have all of your employees been returned to work with all the benefits provided for under the terms of the contract arrived at on April the 22nd? A. Yes.

* * * *

Q. Did you have an assistant store manager in that store after the strike? A. No, sir. The volume was off too much and it stayed off several weeks and we felt, between Harold Renfro and myself that we had no need of an assistant store manager.

* * * *

Q. Did you continue all your health and welfare benefits during the period of the strike? A. Yes, sir.

* * * *

THOMAS SCHNAUBERT, a witness called by and on behalf of the Respondents, after being first sworn on oath, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Will you state your name please? A. Thomas B. Schnaubert.

Q. Are you the owner of Cashway Food Store? A. Yes, sir.

[fol. 56] Q. Can you tell us whether or not you were present when a agreement was reached between the members of the multiemployers bargaining unit to treat a strike against any member of the unit as a strike against the entire unit? A. Yes sir. It was held in Cashway Number 1, 701 East Broadway in Hobbs. Mr. Schoberth from Safeway, Mr. Brown, Mr. Crabb and Mr. Grenault were present.

Q. What was your reason for reaching that decision? A. We had heard rumors of strikes pertaining to the Retail Clerks' Union—had decided to—they did strike—that if they did strike, one that would be against all of us and had to act as a multiple employer bargaining unit to fight such.

Q. You are a small operator? A. I'm a small operator.

Q. Have you authorized Mr. Lenn Jones to act for you in any capacity in any matter whatsoever other than in the negotiations of any collective bargaining contract? A. No sir.

Q. Have you authorized any other member of the multi-employer unit to act for you in any manner whatsoever? A. My brother sat in on the negotiations.

Q. I'm talking about any other member. A. No, sir.

Q. Did you enter into any agreement with any member of the multi-employer bargaining unit as to how you or they would operate their stores during the period of the strike? A. No sir.

Q. In operating your stores during the period of the strike did you operate them completely independently of all of the members of the multi-employer bargaining unit? A. Yes, sir.

* * * *

Q. During the period of the strike, did you pay your employees vacation benefits ? If they requested it? A. Three employees were paid. There were four of them.

Q. Did you continue the *senority* of your employees during the period of the strike? A. Yes, sir.

* * * *

LENN JONES, a witness, called by and on behalf of the Respondents, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Could you tell us your name, sir? A. Lenn Jones.

Q. And who are you employed by, Mr. Jones? A. Safeway Stores, Incorporated.

[fol. 57] Q. What is your job with Safeway Stores? A. Branch manager of Industrial Relations Department, Dallas, Texas.

* * * *

Q. (By Mr. Keller) Were you ever authorized to represent or act in any capacity for any member of this multi-employer bargaining unit, except with respect to negotiating the collective bargaining agreement? A. No, I was not.

Q. Do you know of any agreement between the members of the multi-employer bargaining unit as to how their stores would be operated in the event of a strike against any one of them? A. No.

Q. Could you tell us whether Safeway Store was operated completely independently from the other stores? A. Yes, they were.

Q. That's during the period of the strike? A. During the period of the strike.

Q. Were you present during most of the bargaining negotiations between members of the multi-employer bargaining unit and the Union? A. Yes, I was.

Q. You were spokesman for the employer unit? A. Yes.

Q. Were you present at the negotiating session on April 22nd, 1960 when the new contract was negotiated? A. It started April 21st and extended into April 22nd and I was present.

Q. You were there? A. Yes.

Q. Was there any discussion as to how employees would be returned to work at the respective stores? A. Yes there was. And I would like to refer to my notes on that if I may. My original notes—in that session there was Mr. H. H. Atkins, Federal Mediator, Paul Hansen, and Mr. Andrea. For the Union, I was present with Mr. Steve Schnaubert representing the industry and we discussed the—how we would set up our operations as we were coming out of the strike and I brought up the point that inasmuch as some of the businesses were down tremendously and perhaps there would be a good deal of time lapse before these normal business would be restored, that we as an industry felt we should have leeway on

putting our people back to work. And it was agreed with Mr. Hansen and Mr. Andrea, who was present, with Mr. Hansen being the spokesman made the agreement that we would return them to work and if it were necessary, not to put the entire staff back, but those with the least amount of *senority* would be the ones to be kept off work until such time that the company could put them back. As my notes show, we agreed that Section 8 of the contract which is the *senority* clause would be the governing factor.

[fol. 58] Q. Did you advise the members of the multi-employers unit as to your agreement with Mr. Hansen as to reinstatement of employees? A. I did. I advised the group that it would be necessary that all employees who were out on strike be put back to work; that if business were down and all couldn't be put back to work that they would have to be laid off in accordance to *senority;* that in no case could an employee who had been working replace any of the Union members who were to come back to work.

Q. Did you instruct Mr. Schoberth as District Manager of Safeway Stores as to how Safeway Stores would reinstate their employees? A. I did and I received word that there was a mixup in—and that Safeway perhaps wasn't following the agreement. I called Mr. Schoberth and reiterated again that we were to put them back in accordance with *senority*, and he said that they had used that principle, and I at that time referred him to speak to Mr. Hansen who was in Carlsbad and Mr. Schoberth reported to me later that he had discussed it with Mr. Hansen. And that Mr. Hansen was in agreement—that we had agreed in our meeting to put them back in accordance with *senority*. If there were any to be laid off due to the drop in business. I might add one point here if I may. One of the reasons (interrupted)

MR. RHEA: Is this an answer to a question? A. I was just going to mention why the drop in business.

MR. RHEA: I'd prefer that counsel ask the questions and let you answer them. A. All right.

Q. (By Mr. Keller) Have all of Safeway's employees been returned to work with full *employemnt* status and

benefits under the terms of the contract? A. All those who desired to return, yes.

* * * *

Q. Was Safeway ever notified before the strike that it would not be struck? A. No.

Q. Were you ever notified before the strike as to which of the stores might or might not be struck? A. No.

* * * *

[fol. 59] ROBERT SCHOBERTH, a witness, called by and on behalf of the Respondents, after first being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Keller

Q. Mr. Shoberth, you have previously been sworn as a witness in this case? A. Yes.

Q. I think you identified yourself as District Manager of Safeway Stores? A. Yes, that's correct.

Q. Following the negotiations of the new contract on April 22, 1960, did you receive any instructions from Mr. Lenn Jones as to how Safeway personnel was to be returned to work? A. Yes I did.

Q. What did he instruct you? A. Mr. Jones gave me the rates of pay and various conditions of the contract that had been agreed upon, plus the fact that employees would be returned on a *senority* basis in the event that we didn't need everyone—that we should go by the *senority* list. Immediately following the meeting which early in the A.M. hours of the 22nd, the two store managers in Carlsbad and myself got together and determined what was necessary. Then the following morning when the store managers assigned the working schedule and hours, they then notified the people on a *senority* basis who was available. * * *

[Secretary's Certificate of the National Labor Relations Board. Omitted in printing]

[fol. 60] [File Endorsement Omitted]

[fols. 60A-60B-61] * * *

[fol. 62]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 25th, 1963.

* * * *

Before Honorable Alfred P. Murrah, Chief Judge, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard and was argued by counsel, Melvin J. Welles, Esquire, appearing for petitioner, William L. Keller, Esquire, appearing for respondents.

Thereupon this cause was submitted to the court.

[fol. 63]

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1963

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, IRVING L. GOSSETT and J. C. WEST, JR., doing business as BROWN FOOD STORE; TOOTIE SCHNAUBERT, doing business as CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; and ARNOLD CRABB, doing business as THRIFTY WAY FOOD STORE, RESPONDENTS

[File Endorsement Omitted]

On Petition for Enforcement of an Order of the National Labor Relations Board

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Melvin J. Welles (Stuart Rothman, Dominick L. Manoli, Marcel Mallet-Prevost and Gary Green were with him on the brief for Petitioner.

William L. Keller (Clark, Reed & Clark, Robert L. Clark and Allen Butler were with him on the brief for Respondents.

On the brief for Amici Curiae were Joseph M. McLaughlin and Frederick A. Morgan of McLaughlin and McLaughlin,; Food Employers Council, Inc.; California

Assn. of Employers; California Metal Trade Assn.; Distributors Association; Employers Council of Monterey County, Inc.; Federated Employers of San Francisco; Federated Employers of the Bay Area; Peninsula Employers Council, Sacramento Valley Employers' Council; San Francisco Employers Council; San Fran-
[fol. 64] cisco Retailers' Council; San Joaquin County Industrial Association; and Valley Employers Association.

OPINION—filed June 17, 1963

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

This case presents a single problem but one novel and important in the area of multi-employer bargaining under the National Labor Relations Act. The determinative issue, broadly stated, is whether the non-struck members of a multi-employer bargaining group who have locked out their employees following the initiation of an economic strike against one member of the bargaining group may operate with temporary replacements. Tht National Labor Relations Board, two members dissenting, found that the hiring of replacements by the non-struck employers rendered the lockout unlawful and hence violative of Secs. 8(a)(1) and 8(a)(3) of the Act. The present petition seeks enforcement of the Board order requiring certain remedial action upon the part of respondents.[1] The alleged unfair labor practices having occurred in Carls-
[fol. 65] bad, New Mexico, this court had admitted jurisdiction under Sec. 10(e) of the Act. 29 U.S.C.A. sec. 151, et seq.

The case arises from a factual background which leaves the determinative question free from the complication

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[1] Originally named in the charges were Food Jet, Inc. and Lenn Jones, Agent of Multi-Employer Bargaining Association, but each was found not to have violated any provision of the Act. The present petition thus seeks no enforcement aid against either but Food Jet, Inc., is sometimes included in general references made to respondents.

of disputed side issues of fact or law. Respondents are operators of seven retail food stores in Carlsbad, New Mexico, who have traditionally bargained upon a group basis [2] with the recognized bargaining agent of its clerical employees, Local 462 of the Clerks International Association. For many years the Union and respondents had enjoyed an amicable relationship and their collective bargaining procedures had resulted in agreements containing a union shop provision and in settling problems of wage increases and similar customary subjects of negotiation. On September 17, 1959, the Union gave notice of its desire to bargain on proposed changes in the then current contract which was due to expire shortly. The notice was not timely but respondents waived the technicality and agreed to bargain. The parties met on January 15, 1960, and both Union and respondents bargained in good faith at numerous sessions thereafter. By February [fol. 66] 17, 1960, complete accord had been reached as to all provisions of the new contract except the amount and retroactivity of wage increases. Bargaining continued and at a session held March 2 the Union informed respondents that a strike vote had been taken and a strike authorized. No information was given as to when, how or against whom the threatened strike would be effectuated. Respondents replied that "they would consider a strike against any of them to be a strike against all of them."

On the morning of March 16 the Union struck a single store, Food Jet, Inc.[3] Respondents immediately locked out their employees and informed them they would not

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[2] Multi-employer bargaining is a recognized and generally successful negotiating procedure of benefit to labor and management alike. Amici Curiae point out that in Southern California approximately 1014 food operators bargain as a single unit with the various Locals likewise coming to the bargaining table together.

[3] This action is the initial step in the so-called "whip-saw" strike. Usually the smallest of the group is struck in order to focus the economic burden of the strike at the weakest point. If successful at this point, successive strikes follow against other single members of the group until the final goal is accomplished. The technique is not novel to labor problems and finds use in many aspects of economic, and, indeed, political life.

be allowed to work for the duration of the strike against Food Jet, Inc. Each store operated on a limited basis during the strike and lockout. Food Jet, Inc., hired replacements for its striking employees. Safeway closed one store but operated another through the transfer of personnel from other areas; the other respondents remained open through the efforts of supervisory employees, relatives and temporary employees hired only for the [fol. 67] duration of the controversy. Bargaining between the Union and respondents continued and resulted in an agreement reached on April 22, 1960. All regular employees were immediately returned to work with full status rights and benefits.

The decision of the Board that the act of respondents in hiring replacements is discriminatory in violation of Sec. 8(a)(3) and coercive in violation of Sec. 8(a)(1) is not premised upon evidentiary findings of unlawful motivation and hence does not fall within that class of case where an otherwise permissible course of conduct by an employer may be rendered unlawful by the specifics of subjective intent. Labor Board v. James & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893; Associated Press v. Labor Board, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953; Olin Matheson Chem. Corp. v. Labor Board, 352 U.S. 1020, 77 S. Ct. 587, 1 L. Ed. 562. And see Utah Plumbing and Heating Contractors Assn. v. N.L.R.B., 10 Cir., 294 F. 165. But lack of evidence of specific unlawful intent by an employer is not fatal to the decision of the Board if the conduct is such to carry its own indicia of intent sufficient to place the question within the orbit of the Board's prerogative of balancing the legitimate interests of labor and management in furtherance of the general purposes of the Act. N.L.R.B. v. Erie Re- [fol. 68] sistor Corp.,—U.S.—, decided May 13, 1962. The crux of the Board decision here is premised upon an ultimate finding of unlawful intent based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements. The Board expresses it thus:

> "If the union could successfully strike one at a time, the other members of the employer unit would in or-

dinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the 'whipsaw'. For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory'."

Can it be reasonably inferred that the act of hiring [fol. 69] replacements, per se, is "retaliatory" rather than "defensive"? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in Labor Board v. Truck Drivers Union (Buffalo Linen), 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 676, and Labor Board v. Mackay Radio & Tel. Co. (Mackay), 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In *Buffalo Linen* the Court gave its stamp of approval to the recognition by the Board that after the initiation of a whipsaw strike a threat of strike existed against the other employers which created an economic problem legally justifying a temporary lockout of employees. Basically we interpret *Buffalo Linen* as upholding the legitimacy of multi-employer bargaining and a recognition that to preserve the equality of such bargaining the employer may resort to self-help when the legitimate interests of employer and employees collide. Thus the efforts of the whipsaw strike to atomize the unity of the multi-employer group can be lawfully neutralized by the utilization of a temporary lockout. The decision in *Buffalo Linen* went no further for the factual background went no further. In the case at bar neither Food Jet, Inc., the struck employer, nor respondents, who locked out, remained totally inoperative as in *Buffalo*. Here, each remained in limited operation by hiring temporary re- [fol. 70] placements.

In *Mackay*, the Supreme Court firmly established the general right of a struck employer to preserve his business by the hiring of replacements for strikers. Such right cannot be exercised in a discriminatory manner however. Labor Board v. Erie Resistor Corp., supra. The decision of the Board in the case at bar recognized the right of the struck employer, Food Jet, Inc., to replace and hence found it, but only it, not in violation of the Act. Although recognizing the right of Food Jet, Inc., to hire replacements under *Mackay* and the right of respondents to shut down in order to preserve the integrity of multi-employer bargaining under *Buffalo Linen* the Board reasons that respondents could have stayed operative with their regular employees and thus there was no economic necessity for replacements. The Board's decision states in such regard:

> "Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own em-
> [fol. 71] ployees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet."

We agree with the dissenting members of the Board that such view "renders largely illusory the right of lockout given them by the Supreme Court in Buffalo Linen."

The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers

cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure "the preservation of the in- [fol. 72] tegrity of the multi-employer bargaining unit." It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision,[4] is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not.

However, we do not understand *Buffalo Linen* to hold, and we do not hold, that a permissible lockout after the initiation of a whipsaw strike places the locked out employees in the absolute status of the actual strikers. Varying conditions premising the lockout, actual motives arising either before or after the lockout, or any number of possible factors may well bring particular cases within the area of the Board's primary responsibility of balancing legitimate interests by means of its expertise. We do hold that the Board has erred in its interpretation of [fol. 73] *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike.

---

[4] See Mr. Justice Brennan's discussion in 353 U.S. 95, 96.

N.L.R.B. v. Insurance Agents Union, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed.2 454.

Enforcement is denied.

[fol. 74]

MURRAH, CHIEF JUDGE, DISSENTING.

I would enforce the Board's Order for the very reason which prompted the Supreme Court to enforce the Order in Buffalo Linen. In that case, the non-struck members of the employer unit temporarily locked out their employees, and shut down their operations. The Board, in our case, construed its decision in Buffalo as departing "from a long line of its precedents," to hold that the lock out was not an unfair labor practice, but a "legitimate defensive means of protecting the integrity of the multi-employer bargaining unit against the disintegration threatened by the whip-saw strike." The Supreme Court sustained the Board's Order, as a proper exercise of its administrative function to strike a balance between the conflicting legitimate interests of the two bargaining units. In doing so, the Court emphasized that the balancing of the conflicting interests at the bargaining table was "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

In the process of balancing the conflicting interests, in our case, the Board found a "critical difference" between a defensive shut down, in Buffalo, and the lock out and continued operations with replacements, as here. It rea-[fol. 75] soned that, in the context of our case, "locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shut down to preserve the solidarity of the association unit;" that "if the struck member operates through replacements, no economic necessity exists for the other members shutting down;" and, that a lock out and replacements, in these circumstances, may form the basis for an inference that such action was taken "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

The Board was, indeed, sharply divided in its analysis and application of Buffalo to the facts of our case, and the consequent inference to be drawn from the respondent's conduct here. But, the majority view, nevertheless, prevails as the specialized judgment of the Board in its "spacious domain of policy," i.e., see: Phelps Dodge v. N.L.R.B., 313 U.S. 177, 194, cited and relied upon in Buffalo Linen. In these circumstances, it is not within the judicial prerogative to resolve the contrariety in the Board. It is sufficient, or limited judicial review, that the majority determinations of the Board are within the ambit of policy administration. Certainly, it is not within the judicial prerogative to say that a shut down is illusory, unless the employer is allowed to continue operations with replacements, for to me, the very statement, [fol. 76] on its face, involves the process of balancing conflicting interests at the bargaining table—a function which, as we have seen, is within the Board's exclusive province.

[fol. 77]

IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

* * * *

Before Honorable Alfred P. Murrah, Chief Judge, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

JUDGMENT—June 17, 1963

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order and was argued by counsel.

On consideration whereof, it is hereby ordered that enforcement of the order of the National Labor Relations Board be and the same is hereby denied. Judge Murrah dissented.

[fol. 78]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1963

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 16, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16, 1963.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1963

[fol. 80]

SUPREME COURT OF THE UNITED STATES

No. 558, October Term, 1963

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JOHN BROWN, ET AL.

ORDER ALLOWING CERTIORARI.—January 6, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 721271 709

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR., D/B/A BROWN FOOD STORE; TOOTIE SCHNAUBERT D/B/A CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; ARNOLD CRABB D/B/A THRIFTY WAY FOOD STORE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 12–21) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 4–12, 20–27)[1] are reported at 137 NLRB 73.

[1] "R." refers to the Transcript of Record in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (App. A, *infra*, p. 21). On September 16, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly find it to be an unfair labor practice, when a struck member of a multi-employer bargaining unit attempts to operate with replacements, for the other members to hire replacements in the places of their regular employees represented by the union, even though the regular employees are able and willing to work.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 22–23.

STATEMENT

A. The Board's findings of fact

Respondents are retail food store operators in Carlsbad, New Mexico, who have bargained on a group basis with the Retail Clerks International Association, Local 462. Each company recognizes the Union as the bargaining agent for all its clerical employees, and each participates in joint negotiations which culminate in the execution of a collective bargaining agreement binding upon all (R. 20; 41–42).

The Union and the employers' bargaining group commenced negotiations for a new contract in January 1960. While negotiations were in progress, the employers met among themselves and agreed that all would send their employees home if the Union should strike any of the stores (R. 20; 37, 39–40, 46, 54, 56). By March 2, the parties had agreed upon all contract terms except wages (R. 20). On that day the Union authorized a strike. When the Association was informed, it replied that it would consider a strike against any member of the bargaining group to be a strike against all (R. 42).

On March 16, the Union struck and picketed Food Jet, one of the Association members. The other four employers, who operated six stores, were immediately notified, and all responded by sending home their own employees (R. 37). The employees of the non-struck employers who reported for work that day were met by their store managers and were told that, because of the strike at Food Jet, they were locked out until further notice, or until the strike terminated (R. 28, 29, 31, 46, 50).

Shortly after the strike began, Food Jet hired replacements for the vacancies left by the strikers, and it continued operations (R. 20; 35). The non-struck employers, while continuing their lockout, functioned with managerial personnel, with relatives of management, and with temporary help expressly hired only for the duration of the strike (R. 20–21; 38, 45, 46–47, 48–51, 53–54). Some of these employers also obtained the services of employees transferred from other stores outside the Association (R. 30, 34, 48–49).

Meanwhile, the parties continued to negotiate and, on April 22, 1960, they reached final agreement on all contract terms. Thereupon, the Union terminated the strike. Respondents then dismissed the temporary replacements and recalled their regular employees (R. 21; 42, 50, 55, 58–59).

B. The Board's decision and order

Distinguishing the instant case from the *Buffalo Linen* decision,[2] the Board (with two Members dissenting) concluded that the nonstruck employers violated Sections 8(a) (1) and (3) of the Act by temporarily replacing their regular employees because of the Union's strike against Food Jet. In arriving at this conclusion, the Board reasoned as follows (R. 22–23):

> While the present case has its similarity to the *Buffalo Linen* situation, there is a critical difference between the two cases. The underlying rationale of *Buffalo Linen* was that a shutdown was deemed appropriate to preserve the established unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inapposite where, as here, the employers do not shut down. * * *
>
> We conclude, in balancing the conflicting interest of the employees and the Respondents

[2] *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87 [hereinafter *Truck Drivers*].

> under the particular circumstances of this case, that the nonstruck Respondents were not justified in replacing their employees because of a strike called by the Union against Respondent Food Jet. Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

Accordingly, the Board ordered respondents to cease and desist from these unfair practices and to reimburse their employees for pay losses resulting therefrom.

C. The decision of the court of appeals

The court of appeals denied enforcement of the Board's order. It held that temporary replacement of regular employees was an appropriate defensive measure to preserve the integrity of the multi-employer bargaining unit within the meaning of this Court's decision in the *Truck Drivers* case. Chief Judge Murrah dissented. He said that the *Truck Drivers* case had held that "the process of balancing conflicting interests * * * [is] a function * * * within the Board's exclusive province," and that the "specialized judgment" of the Board was entitled to stand in this case (pp. 20–21, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals has misapplied and improperly extended the decision of this Court in *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, and has reversed the National Labor Relations Board's policy determination in an area in which this Court has held the Board to have primary responsibility, subject to only limited judicial review.

In the *Truck Drivers* case the Court sustained the Board's ruling that members of a multi-employer bargaining unit do not commit an unfair labor practice if, during contract negotiations, they lock out their own employees in response to the union's calling a strike against one of the employer members. Although such a lockout literally "interferes with" the employee's right to engage in "concerted activities" (Sections 7, 8(a)(1)), the interference was thought not to violate Section 8(a)(1) because of the need to accommodate the employers' interests in preserving the integrity of the multi-employer bargaining unit. A strike against one member of a multi-employer unit seeks to use the sales and services of the remaining members to increase the pressure upon the struck member to capitulate to the union's demand; stated conversely, it seeks to deprive the multi-employer association of the economic strength of the combination. Since such a strike against one member of the unit carries the implicit threat of successive strikes against each of the other firms individually, with the "calculated purpose" of causing "successive and individual employer capitulations,"[3] the whipsawing tech-

[3] *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448.

nique necessarily threatens to destroy the integrity of the bargaining unit. In order to protect bargaining on a group basis and retain group power in negotiations, the Board held, and [this] Court agreed, that the employers might lawfully counter the strike against one member with a lockout by all the members.

The decision below converts the privilege of taking that limited defensive action into a right to use a further offensive weapon that the Board has condemned. When the Union struck Food Jet, the other six grocery stores were privileged, under the *Truck Drivers* decision, to lock out their own employees, treating the strike against Food Jet as essentially a strike against all the employers in the bargaining unit. They retained that privilege even though Food Jet later attempted to resume operations. Not content with this, the other stores took the offensive against the Union and replaced employees who were available and willing to work, with strike-breakers whose virtue apparently was that they had no connection with the striking union. The layoffs can only be described as reprisals against the Union and its members designed to punish them for the strike at Food Jet, while the employers continued business operations. Manifestly, this was the rankest kind of discrimination. It has long been settled that an employer violates Section 8(a)(1) and (3) of the Act if he denies an ex-striker an open position because he went on strike.[4] Even

[4] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928 (C.A. 2); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193

the struck employer, Food Jet, would have committed an unfair labor practice had it hired replacements for open jobs, in the place of strikers who wished to return to work. *A fortiori* the discrimination is unfair when employees who did not strike are replaced because their union has struck another concern. The discrimination is as improper when the replacement is temporary as it is when the new employee is permanent.

The court below reasoned that, when the struck employer attempts to continue operations, recognition of a privilege to replace the non-striking employees during the ensuing lockout is necessary "if unity of the multi-employer group is to be maintained" (p. 17, *infra*). The reasoning involves two misconceptions. In the first place, the struck employer himself would have no privilege to put a replacement in the job of an employee who was willing and able to work.[5] The right to hire replacements is limited to hiring substitutes for employees who insist upon going and staying on strike. Respondents' employees all were able and willing to work.

F. 2d 748, 749 (C.A. 9); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4); *National Labor Relations Board* v. *National Shirt Shops*, 212 F. 2d 491, 494 (C.A. 5); *National Labor Relations Board* v. *J. Mitchko, Inc.*, 284 F. 2d 573, 576–577 (C.A. 3).

[5] See *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10); *National Labor Relations Board* v. *Robinson Freight Lines*, 251 F. 2d 639, 641 (C.A. 6); *National Labor Relations Board* v. *Anchor Rome Mills*, 228 F. 2d 775, 780 (C.A. 5); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Luzerne Hide & Tallow*, 188 F. 2d 439, 442 (C.A. 3), certiorari denied, 342 U.S. 868.

Second, the employer members of an association who have not been struck can keep all the members of the association "in the same boat," either by shutting down entirely, or by curtailing their business and laying off roughly the same percentage of their normal complements of workers as the struck employer is lacking, or, if the struck employer has resumed full operations, by resuming business as usual. With this range of choices available the members of the employer association cannot justify the discrimination as necessary to avoid being pawns in the union's attempt to whipsaw them individually. Discriminating against regular employees in favor of replacements, therefore, serves no purpose but reprisal against the union.

Not only did the court of appeals err in its substantive analysis of the problem, but it rendered the decision in disregard of the teaching of the *Truck Drivers* case by undertaking to make its own appraisal and accommodation of the diverse interests. In the *Truck Drivers* case, this Court held (353 U.S. at 96)—

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

This principle was expressly re-affirmed last Term in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–237.

The distinction which the Board has drawn between defensive lockouts and reprisals in the form of layoffs and replacement is the very kind of delicate adjustment that the Board is charged with making on the basis of its knowledge of the practical consequences. The Board is the agency established by Congress to determine whether replacing locked-out employees who are willing to work is the substantial equivalent of replacing employees who go on strike, or is an offensive weapon against the union which has no justification in view of the availability of other methods of preserving substantial parity and resulting unity among the members. In substituting its judgment for that of the Board, the court of appeals exceeded the proper limits of judicial review.

Although the precise issue is novel, the importance of multi-employer bargaining makes it desirable that this Court promptly correct the misapplication of its decision in the *Truck Drivers* case. Multi-employer bargaining is common throughout the United States. It is estimated that in 1961 about half of the 329 major collective bargaining agreements (*i.e.*, contracts covering 5,000 or more workers) were multi-employer agreements.[6] Thousands of smaller employers, especially in distribution industries, negotiate through multi-employer associations. The question presented here, like that in the *Truck Drivers* case, will determine one of the basic rules for multi-employer

[6] *Major Union Contracts in the United States, 1961*, U.S. Department of Labor, BLS Bull. No. 1353, p. 4 (GPO, Dec. 1962).

bargaining. Thus, it affects many thousands of employers and millions of employees.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1963.

APPENDIX A

United States Court of Appeals Tenth Circuit

May Term, 1963

No. 7089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, IRVING L. GOSSETT AND J. C. WEST, JR., DOING BUSINESS AS BROWN FOOD STORE; TOOTIE SCHNAUBERT, DOING BUSINESS AS CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; AND ARNOLD CRABB, DOING BUSINESS AS THRIFTY WAY FOOD STORE, RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

Before MURRAH, *Chief Judge,* and LEWIS and BREITENSTEIN, *Circuit Judges.*

LEWIS, *Circuit Judge*:

This case presents a single problem but one novel and important in the area of multi-employer bargaining under the National Labor Relations Act. The determinative issue broadly stated, is whether the non-struck members of a multi-employer bargaining group who have locked out their employees following the initiation of an economic strike against one member of the bargaining group may operate with temporary replacements. The National Labor Relations Board, two members dissenting, found that the hiring of replacements by the non-struck employers rendered the lockout un-

lawful and hence violative of Secs. 8(a)(1) and 8(a)(3) of the Act. The present petition seeks enforcement of the Board order requiring certain remedial action upon the part of respondents.[1] The alleged unfair labor practices having occurred in Carlsbad, New Mexico, this court had admitted jurisdiction under Sec. 10(e) of the Act. 29 U.S.C. sec. 151, et seq.

The case arises from a factual background which leaves the determinative question free from the complication of disputed side issues of fact or law. Respondents are operators of seven retail food stores in Carlsbad, New Mexico, who have traditionally bargained upon a group basis[2] with the recognized bargaining agent of its clerical employees, Local 462 of the Clerks International Association. For many years the Union and respondents had enjoyed an amicable relationship and their collective bargaining procedures had resulted in agreements containing a union shop provision and in settling problems of wage increases and similar customary subjects of negotiation. On September 17, 1959, the Union gave notice of its desire to bargain on proposed changes in the then current contract which was due to expire shortly. The notice was not timely but respondents waived the technicality and agreed to bargain. The parties met on

[1] Originally named in the charges were Food Jet, Inc. and Lenn Jones, Agent of Multi-Employer Bargaining Association, but each was found not to have violated any provision of the Act. The present petition thus seeks no enforcement aid against either but Food Jet, Inc., is sometimes included in general references made to respondents.

[2] Multi-employer bargaining is a recognized and generally successful negotiating procedure of benefit to labor and management alike. Amici Curiae point out that in Southern California approximately 1014 food operators bargain as a single unit with the various Locals likewise coming to the bargaining table together.

January 15, 1960, and both Union and respondents bargained in good faith at numerous sessions thereafter. By February 17, 1960, complete accord had been reached as to all provisions of the new contract except the amount and retroactivity of wage increases. Bargaining continued and at a session held March 2 the Union informed respondents that a strike vote had been taken and a strike authorized. No information was given as to when, how or against whom the threatened strike would be effectuated. Respondents replied that "they would consider a strike against any of them to be a strike against all of them."

On the morning of March 16 the Union struck a single store, Food Jet, Inc.[3] Respondents immediately locked out their employees and informed them they would not be allowed to work for the duration of the strike against Food Jet, Inc. Each store operated on a limited basis during the strike and lockout. Food Jet, Inc., hired replacements for its striking employees; Safeway closed one store but operated another through the transfer of personnel from other areas; the other respondents remained open through the efforts of supervisory employees, relatives and temporary employees hired only for the duration of the controversy. Bargaining between the Union and respondents continued and resulted in an agreement reached on April 22, 1960. All regular employees were immediately returned to work with full status rights and benefits.

[3] This action is the initial step in the so-called "whipsaw" strike. Usually the smallest of the group is struck in order to focus the economic burden of the strike at the weakest point. If successful at this point, successive strikes follow against other single members of the group until the final goal is accomplished. The technique is not novel to labor problems and finds use in many aspects of economic, and, indeed, political life.

The decision of the Board that the act of respondents in hiring replacements is discriminatory in violation of Sec. 8(a)(3) and coercive in violation of Sec. 8(a)(1) is not premised upon evidentiary findings of unlawful motivation and hence does not fall within that class of cases where an otherwise permissible course of conduct by an employer may be rendered unlawful by the specifics of subjective intent. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893; *Associated Press* v. *Labor Board*, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953; *Olin Mathieson Chem. Corp.* v. *Labor Board*, 352 U.S. 1020, 77 S. Ct. 587, 1 L. Ed. 2 562. And see *Utah Plumbing and Heating Contractors Assn.* v. *N.L.R.B.*, 10 Cir., 294 F2 165. But lack of evidence of specific unlawful intent by an employer is not fatal to the decision of the Board if the conduct is such to carry its own indicia of intent sufficient to place the question within the orbit of the Board's prerogative of balancing the legitimate interests of labor and management in furtherance of the general purposes of the Act. *N.L.R.B.* v. *Erie Resistor Corp.*, — U.S. —, decided May 13, 1962. The crux of the Board decision here is premised upon an ultimate finding of unlawful intent based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements. The Board expresses it thus:

> If the union could successfully strike one at at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the "whipsaw". For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic

> necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be "defensive" and becomes "retaliatory".

Can it be reasonably inferred that the act of hiring replacements, per se, is "retaliatory" rather than "defensive"? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in *Labor Board* v. *Truck Drivers Union* (*Buffalo Linen*), 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 2676, and *Labor Board* v. *Mackay Radio & Tel. Co.* (*Mackay*), 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In *Buffalo Linen* the Court gave its stamp of approval to the recognition by the Board that after the initiation of a whipsaw strike a threat of strike existed against the other employers which created an economic problem legally justifying a temporary lockout of employees. Basically we interpret *Buffalo Linen* as upholding the legitimacy of multi-employer bargaining and a recognition that to preserve the equality of such bargaining the employer may resort to self-help when the legitimate interests of employer and employees collide. Thus the efforts of the whipsaw strike to atomize the unity of the multi-employer group can be lawfully neutralized by the utilization of a temporary lockout. The decision in *Buffalo Linen* went no further for the factual background went no further. In the case at bar neither Food Jet, Inc., the struck employer, nor respondents, who locked out, remained totally inoperative as in *Buffalo*. Here, each remained in limited operation by hiring temporary replacements.

In *Mackay*, the Supreme Court firmly established the general right of a struck employer to preserve his business by the hiring of replacements for strikers. Such right cannot be exercised in a discriminatory manner however. *Labor Board* v. *Erie Resistor Corp., supra.* The decision of the Board in the case at bar recognized the right of the struck employer, Food Jet, Inc., to replace and hence found it, but only it, not in violation of the Act. Although recognizing the right of Food Jet, Inc., to hire replacements under *Mackay* and the right of respondents to shut down in order to preserve the integrity of multi-employer bargaining under *Buffalo Linen* the Board reasons that respondents could have stayed operative with their regular employees and thus there was no economic necessity for replacements. The Board's decision states in such regard:

> Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet.

We agree with the dissenting members of the Board that such view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen.*"

The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the

struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure "the preservation of the integrity of the multi-employer bargaining unit." It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision,[4] is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not.

However, we do not understand *Buffalo Linen* to hold, and we do not hold, that a permissible lockout after the initiation of a whipsaw strike places the locked out employees in the absolute status of the actual strikers. Varying conditions premising the lockout, actual motives arising either before or after the lockout, or any

[4] See Mr. Justice Brennan's discussion in 353 U.S. 95, 96.

number of possible factors may well bring particular cases within the area of the Board's primary responsibility of balancing legitimate interests by means of its expertise. We do hold that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike. *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed.2 454.

Enforcement is denied.

Filed: United States Court of Appeals, Tenth Circuit Jun 17 1963.

ROBERT B. CARTWRIGHT,
Clerk.

MURRAH, *Chief Judge*, dissenting:

I would enforce the Board's Order for the very reason which prompted the Supreme Court to enforce the Order in *Buffalo Linen*. In that case, the non-struck members of the employer unit temporarily locked out their employees, and shut down their operations. The Board, in our case, construed its decision in Buffalo as departing "from a long line of its precedents," to hold that the lock out was not an unfair labor practice, but a "legitimate defensive means of protecting the integrity of the multi-employer bargaining unit against the disintegration threatened by the whip-saw strike." The Supreme Court sustained the Board's Order, as a proper exercise of its administrative function to strike a balance between the conflicting legitimate interests of the two bargaining units. In doing so, the Court emphasized that the balancing of the conflicting inter-

ests at the bargaining table was "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

In the process of balancing the conflicting interests, in our case, the Board found a "critical difference" between a defensive shut down, in Buffalo, and the lock out and continued operations with replacements, as here. It reasoned that, in the context of our case, "locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shut down to preserve the solidarity of the association unit;" that "if the struck member operates through replacements, no economic necessity exists for the other members shutting down;" and, that a lock out and replacements, in these circumstances, may form the basis for an inference that such action was taken "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

The Board was, indeed, sharply divided in its analysis and application of Buffalo to the facts of our case, and the consequent inference to be drawn from the respondent's conduct here. But, the majority view, nevertheless, prevails as the specialized judgment of the Board in its "spacious domain of policy," i.e., see: *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177, 194, cited and relied upon in *Buffalo Linen*. In these circumstances, it is not within the judicial prerogative to resolve the contrariety in the Board. It is sufficient, on limited judicial review, that the majority determinations of the Board are within the ambit of policy administration. Certainly, it is not within the judicial prerogative to say that a shut down is illusory, unless the employer is allowed to continue operations with replacements, for to me, the very statement, on its face, involves the process of balancing conflicting interests at the bargaining

table—a function which, as we have seen, is within the Board's exclusive province.

JUDGMENT

Nineteenth Day, May Term, Monday, June 17th, 1963

Before Honorable ALFRED P. MURRAH, *Chief Judge*, Honorable DAVID T. LEWIS and Honorable JEAN S. BREITENSTEIN, *Circuit Judges*.

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order and was argued by counsel.

On consideration whereof, it is hereby ordered that enforcement of the order of the National Labor Relations Board be and the same is hereby denied. Judge Murrah dissented.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day fol-

lowing the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

U.S. GOVERNMENT PRINTING OFFICE: 1983

Office-Supreme Court, U.S.
FILED
NOV 18 [redacted]
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 196[redacted]7

No. [redacted]

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOHN BROWN, IRVIN L. GOSSETT AND J. C. WEST, JR. d/b/a BROWN FOOD STORE; TOOTIE SCHNAUBERT d/b/a CASHWAY FOOD STORE; SAFEWAY FOOD STORE, INC.; ARNOLD CRABB d/b/a THRIFTY WAY FOOD STORE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (See Petition, Appendix A., pp. 12-21) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 4-12, 20-27)[1] are reported at 137 NLRB 73.

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[1] "R" refers to the Transcript of Record in the court of appeals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals erred in denying enforcement of a Board order predicated upon a finding that the use of temporary replacements by members of multi-employer bargaining group following and during a legal lockout constituted discriminatory conduct and a violation, *per se*, *of* Section 8 (a) (3) and (1) of the National Labor Relations Act, as amended, notwithstanding the fact that there is no record evidence that in using such temporary replacements any Respondent was guided by any anti-union motivations.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are set forth in the Petition, Appendix B, pp. 22-23.

STATEMENT

A. Statement of Facts

The facts as set forth in the Petition (See Petition, pp. 2-4) and opinion of the Court of Appeals (Petition, App. A, pp. 12-14) are correct. Respondents, however, because of the Board's finding of discrimination within the meaning of the Act, stress the fact that prior collective bargaining contracts had contained a union shop provision and that

at the time of the strike herein the parties had agreed to all portions of the new contract except wage increases and retroactivity of wage increases (R. 41-42). Moreover, there is no record evidence and no Board finding that any respondent has at any time, either prior to or during the strike and lockout, uttered a single word or engaged in a single act that indicated any anti-union animus. Indeed, past relations between the union and respondents have generally been very good (R. 41).

B. The Board's Findings and Conclusions

The Board majority, Chairman McCulloch and Members Leedom and Brown, in adopting the trial examiner's findings, concluded that "the initial lockout by the nonstruck employers was a permissible defensive measure to protect the solidarity of the multiemployer unit under the rule of *Buffalo Linen Supply Company*.[2] The Board majority, however, further concluded, as did the trial examiner, that by continuing to operate even on a makeshift basis during the period of the strike and lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their locked-out employees to discourage membership in the union in violation of Section 8(a) (3) and (1) of the Act, and the lockout was thereby rendered unlawful. (R. 21).

---

[2] *N.L.R.B. v. Truckdrivers Local 449 (Buffalo Linen Supply Company)*, 353 U.S. 87, affirming 109 NLRB 447.

In *Buffalo Linen*, the Board held in effect that the resulting lockout was a legitimate defensive means of protecting the integrity of the multiemployer bargaining unit against the disintegration threatened by the whipsaw strike. It is noted that only Member Rodgers, who dissented herein, was a member of the Board in 1954 when it rendered its opinion in *Buffalo Linen*.

C. The Decision of the Court of Appeals

The Court of Appeals, in agreeing with the dissenting Board members, denied enforcement of the Board's order on the ground that the majority view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen*" (Petition, App. A, p. 17). The Court concluded:

> "We do hold that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike. *NLRB v. Insurance Agents Union*, 361 U.S. 477, 80 S. Ct. 419, 4 L.Ed. 454".

ARGUMENT

A. The Decision of the Court of Appeals is Clearly Correct.

The pattern of conduct in the instant case, prior to respondents' attempts to continue operating, is closely analogous to that in *Buffalo Linen*. In either instance, there was a history of collective bargaining on a multi-employer basis; a bargaining impasse during negotiations for a new contract; a whipsaw strike against one member of the employer group; and, a lockout by other employers in the bargaining unit.

This Court in *Buffalo Linen* quoted, with apparent agreement, the Board's conclusion that the lockout was permissible because "the strike against the one employer

necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association, with the 'calculated purpose' of causing 'successive and individual capitulations'." As this Court further noted, the Board's opinion in *Buffalo Linen*, 109 NLRB 447, held that " 'in the absence of any independent evidence of anti-union motivation * * * the Respondents' (sic) action in shutting their plants until termination of the strike was defensive and privileged in nature, rather than retaliatory and unlawful'."[3] As stated by this Court, [A]lthough the Act protects the rights of the employees to strike in support of their demands, *this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide.*"[4]

Notwithstanding its finding here that the initial lockout was lawful under the rationale of *Buffalo Linen*, the Board majority concluded, without any "independent evidence" on which to base such finding, that the subsequent use of temporary help "constitute[d] a temporary replacement of employees solely because they were engaging in protected concerted activity" (R. 22-23).

As pinpointed by the dissenting opinion of Members Rodgers and Fanning:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8(a) (3), some form of *discrimination must be found.* The only conceivable discriminatory action in the present case,

[3] Quoted at 353 U.S. 91.
[4] 353 U.S. 96. Emphasis added.

> the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." (Emphasis added) (R. 25-26).

Yet the record herein is devoid of any independent evidence of discrimination or unlawful motivation on the part of any respondent. The Board majority, notwithstanding the explicit requirements of Section 10 (e) and (f) of the Act, and *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 774 (1951), that its findings be predicated upon "substantial evidence on the record considered as a whole," has resorted to the simple expedient of finding a *per se* discrimination. This the Board cannot properly do under the facts of this case.

In *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), this Court clearly struck down the simple expedient of the *per se* finding. Therein this Court stated; at 676:

> "Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. NLBR v. Drivers, Chauffeurs, Helpers, etc., 362 US 274, 284-290, 4 L ed 2d 710, 718-721, 80 S Ct 706. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."
>
> "Its power, so far as here relevant, is restricted to the elimination of discrimination * * * the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected

> to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it."

The separate concurring opinion of Justices Harlan and Stewart in *Teamsters Local 357*, in further explication of the decisions, states, at 680:

> "In general, this Court has assumed that a finding of a violation of § 8(a) (3) or § (b) (2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity. See, e.g., NLRB v. Jones & L. Steel Corp., 301 US 1, 45, 46, 81 L ed 893, 916, 57 S Ct 615, 108 ALR 1352; Universal Camera Corp. v. NLRB, 340 US 474, 95 L ed 456, 71 S Ct 456. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exception made to the requirements for a showing of discrimination in other contexts."

See also *N.L.R.B. v. Dalton Brick and Tile Corp.*, 301 F. 2d 886 (CA 5, 1962).

In the instant case, the Court below correctly concluded:

> "The crux of the Board decision here is premised upon an ultimate finding of unlawful intent, based upon indicia appearing from the uncontaminated course of conduct of respondents in hiring replacements * * * Can it be reasonably inferred that the act of hiring replacements, *per se*, is 'retaliatory' rather than 'defensive'? We think it cannot and hold that the Board in so doing has misinterpreted and misapplied the principles set forth by the Supreme Court in *Labor Board v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 2676, and *Labor Board v. Mackay Radio & Tel. Co. (Mackay)*, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

In this case the Board majority has wholly failed to perceive and apply the doctrine of "self help" that this

Court alluded to in *Buffalo Linen*. Indeed, the Board majority has equated the respondents' good faith "self-help" efforts to operate their respective businesses and protect their perishable inventories with "retaliatory" and anti-union motivations.

The "self-help" rationale of *Buffalo Linen* is applicable here. Respondents have done nothing but resort to minimum "self-help" by calling on supervisors, relatives of management and a few temporary employees to keep their stores in limited operation in order to protect their perishable inventories and capital investments and service the food needs of the community of Carlsbad. Had respondents displayed anti-union animus or engaged in conduct interdicted by the Act, the decision of the Board majority might be given more weight. But, the locked-out employees were told that they would be returned to work when the strike was over and their welfare and other employment benefits were maintained during the strike and lockout.

The Board majority decreed that if members of a multi-employer bargaining unit attempt to save their group from the atomization resulting from whipsawing tactics by locking out employees, the lockout *must be* complete and the doors to the business closed. Any attempt to remain open by utilizing temporary help is construed to be, *per se*, an unlawful discriminatory replacement of employees solely because they were striking one of the members of the multi-employer unit. The Board majority refused, therefore, to discuss or concern itself with the potential economic catastrophe flowing from a sudden cessation of

business. What are some of the possible results? First, under the facts at hand, it appears that the community as a whole would have suffered from the lack of an adequate food supply. Aside from supplying the community with food, a closing of the stores would in this case have necessitated the layoff of the respondent's various meat department employees who were not covered by the contract in question and therefore were not engaged in the dispute. The same reasons which permit the lockout must likewise permit, at least to the extent here attempted, the continued operation of the business enterprises. Here the majority attaches no significance whatsoever to the fact that the union and its members were physically striking the multi-employer association in an attempt to force its members to capitulate to the union's demands.

The Court below points with accuracy at the Board majority's basic misapplication and misunderstanding of the rationale of this Court's decision in *Buffalo Linen*. As stated by the Court below (Petition, App. A, pp. 17-18):

> "The impact of the Board's decision is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike the struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantages passes to the struck

> member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*. To the contrary, *Buffalo Linen* recognizes that a lockout is justified in order to assure the preservation of the integrity of the multi-employer bargaining unit. It is no answer to say that the respondents could have remained in operation through retaining their regular employees. This merely denies the privilege of lockout and, through denial, refuses any consideration of the existence of the overriding business purpose which, as recognized in Labor Board v. Erie Resistor Corp., supra, may justify the invasion of union rights. The preservation of the multi-employer bargain unit, approved as it is by congressional consideration and judicial decision, is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not."

The alternative suggested solutions to respondent's dilemma set forth at pp. 8 and 9 of the Petition clearly reflect the Board's continued failure to grasp the economic realities of whipsaw picketing tactics. The Petitioner offers as an alternative the suggestion that "the employer members of an association who have not been struck can keep all members of the association 'in the same boat' either by shutting down entirely, or by curtailing their business and laying off roughly the same percentage of their normal complement of workers as the struck employer is lacking, or if the struck employer has resumed full operations, by resuming business as usual." These suggestions either fail to perceive or wholly ignore the "self-

help" rationale of *Buffalo Linen*, and the right to protect the integrity of the multi-employer bargaining unit. First, it is simply impossible to completely shut down a retail grocery operation which necessarily maintains a large inventory of perishable merchandise. Second, there is obviously no economic parity between an employer who is attempting to operate a store while being picketed by a union and an employer who is not being picketed. Under the Board's reasoning, the union would be in a position, depending on the particular circumstances, to give a favored employer an economic advantage by its method of picketing. The suggestion in the Petition that the employers could lay off "roughly the same percentage of their normal complement of workers as the struck employer is lacking" (Petition, p. 9) would force the employer to make an inherently discriminatory selection as to which employees to lay off because of union activities. The Petitioner does not offer any suggestions as to how such a selection is to be made in situations where all of the employees in the unit may not be union members and the employer does not know which employees are in fact members of the union.

Perhaps, as pointed out in the dissenting opinion of Members Rodgers and Fanning (R. 26), the "majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." Nonetheless, this Court there unequivocally held that, absent other acts proscribed by the statute, the lockout was "defensive and privileged in nature rather than retaliatory," and that respondents therein had the

right to resort to "self help." Respondents submit that in attempting to continue to operate their individual stores they engaged in conduct purely "defensive and privileged," rather than "retaliatory." Moreover, respondents urge that their conduct constituted reasonable "self-help" dictated by the strike action calculated to "atomize" their bargaining unit[5] and the economic pressures resulting from such strike action.

Regardless of the Board's impression of this Court's decision in *Buffalo Linen*, the rationale of that decision renders the lockout herein legal. As stated in the dissenting opinion of Members Rodgers and Fanning (R. 25):

> "Granting that the employers' initial lockout was permissible, as the Supreme Court has held, it seems clear that temporarily replacing the employees for the duration of the strike did not further their union status or union adherence, particularly since the employees in this case were expressly told by Respondents they would have their jobs at the end of the strike. The discrimination, if any, took place at the point of initial lockout, and the Supreme Court has held this to be privileged in the whip-saw situation. How can the performance of a nondiscriminatory act make unlawful something which was theretofore privileged."

It would seem to follow, as stated by the dissenting Members, that, the lockout being legal, "Temporary replacement of the employees in strike status was well within

[5] See *Morand Bros. Beverage Co. v. NLRB*, 190 F. 2d 576 (1951), wherein the Court of Appeals for the Seventh Circuit concluded that where a member of a multi-employer bargaining unit was struck, the other members "could quite properly and realistically view the strike, as they did, as a strike which, though tactically against one petitioner, was in the strategic sense, a strike against the entire membership of the Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union."

the employers' rights under Mackey," wherein this Court declared it permissible for an employer to replace striking employees in an effort to carry on his business. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

This Court in *Mackay* stated, at page 345:

> "There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations. * * * On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikes."

Here the employees in the bargaining unit were engaged in a strike, actual or constructive, against the multi-employer group, with a view to furthering their demands for a new contract. Thus, these employees were thereby placed in strike status or a status substantially similar to strikers.

The lockout herein being privileged and respondents having the right to employ "self help," the Board is without authority, either under the Act or by legal precedent, to "pick and choose which economic devices of labor and management shall be branded as unlawful." As stated by this Court in *National Labor Relations Board v. Insurance Agents*, 361 U.S. 417 at page 489, 80 S. Ct. at page 427:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. * * * (T)he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each make the other party incline to agree on one's terms—exist side by side. * * * But as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."

While it is true that this Court in *Buffalo Linen* stated that "The functions of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review," this Court's later decision in *Insurance Agent's, supra*, removes any possible doubt that Board decisions, to be valid, must be based upon the exercise of the limited powers granted by the Act and supported by substantial evidence on the record considered as a whole.

B. There is no Conflict of Decision

The issue presented herein is novel and the Court below is the first court to issue a judicial opinion on the matter. Respondents submit that this issue should be reserved until such time as there is a conflict in opinions of the circuit courts of appeal.

C. There Is No Important Question of Federal Law

Notwithstanding the plea of importance that the Petition seeks to attach to this case, the immutable fact is that this is the first time in the twenty-eight-year history of the Act the issue has been raised. Respondents therefore respectfully submit that if the issue is truly an important one it will undoubtedly be raised again in the future, in which event another court of appeals will have a chance to study the problem.

CONCLUSION

Respondents respectfully urge that the opinion of the Court below is correct and, for the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, William L. Keller, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of November, 1963, I served copies of the foregoing Brief for Respondents in Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit by air mail, postage prepaid, on the Hon. Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C.

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Statute:

National Labor Relations Act, as amended (16 Stat. 136, 29 U.S.C. 151, *et seq.*):
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Section 8(a)(1) 5, 8, 11
Section 8(a)(3) 5, 8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 7

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 69-77) is reported at 319 F. 2d 7. The decision and order of the Board (R-22-30, 4-19) are reported at 137 NLRB 73.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (R. 77). On September 16, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October

16, 1963 (R. 78). The petition was filed on October 16, 1963, and was granted on January 6, 1964, 375 U.S. 962 (R. 79). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court of appeals exceeded the authorized scope of judicial review in reversing the Board's holding that the other members of a multi-employer bargaining unit committed an unfair labor practice when they responded to a strike against one member by dismissing their non-striking employees for the duration of the strike and continuing operations with replacements even though their regular employees were willing and able to work.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Respondents are retail food store operators in Carlsbad, New Mexico, who have bargained on a group basis with the Retail Clerks International Association, Local 462. Each company recognizes the Union as the bargaining agent for all its clerical employees, and each participates in joint negotiations which normally culminate in the execution of a collective bargaining agreement binding upon all (R. 22-23; 46-47).

The Union and the employers' bargaining association commenced negotiations for a new contract in February 1960. While bargaining was in progress, the employers met among themselves and agreed that all would send their employees home if the Union should strike any of the stores (R. 23; 41, 44, 52, 62, 63-64). By March 2, the parties had agreed upon all contract terms except wages (R. 23; 47). On that day, the Union authorized a strike. When the em-

ployer association was informed of this decision, it replied that it would consider a strike against any one of its members to be a strike against all (R. 48).

On March 16, the Union struck and picketed Food Jet, one of the association members. The other four employers, who operated six stores, were immediately notified, and all responded by sending home their own employees (R. 23; 41). As the employees of each non-struck employer reported for work that day, they were met by their store manager who told them that, because of the strike at Food Jet, they were locked out until further notice, or until the strike terminated (R. 31, 32, 34, 52, 57).

Each respondent thereafter continued to operate his business (R. 23). Food Jet hired replacements for the vacancies left by the strikers (R. 23; 39). The non-struck employers, while continuing their lockout, functioned with managerial personnel, with relatives of management, and with temporary help expressly hired only for the duration of the strike (R. 23; 43, 50-52, 53, 55-56, 57, 60-62). Some of these employers also obtained the services of employees transferred from other stores outside the bargaining unit (R. 33, 38, 55-56).

Meanwhile, the parties continued to negotiate and, on April 22, 1960, they reached final agreement on all contract terms. Thereupon, the Union terminated the strike. Respondents then dismissed the temporary replacements and recalled their regular employees (R. 23; 57, 63, 66-67).

B. THE BOARD'S DECISION AND ORDER

The Board (with two members dissenting) concluded that the non-struck employers violated Sections 8(a)(1) and (3) of the Act by temporarily replacing their regular employees because of the Union's strike against Food Jet. The Board distinguished *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87 (also known as the *Buffalo Linen* decision), which held that where one member of a multi-employer unit is struck, the other members may lock out their employees, as follows (R. 24-25):

> While the present case has its similarity to the *Buffalo Linen* situation, there is a critical difference between the two cases. The underlying rationale of *Buffalo Linen* was that a shutdown was deemed appropriate to preserve the bargaining unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inappropriate where, as here, the employers do not shut down * * *.

The Board ordered respondents to cease and desist from their unfair labor practices and to reimburse their employees for lost pay (R. 27, 12-13).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order. It held that temporary replacement of

regular employees was an appropriate defensive measure to preserve the integrity of the multi-employer bargaining unit (R. 69-76). Chief Judge Murrah dissented on the ground that "the process of balancing conflicting interests * * * [is] a function * * * within the Board's exclusive province" and that the "specialized judgment" of the Board was entitled to stand in this case (R. 76-77).

SUMMARY OF ARGUMENT

National Labor Relations Board v. *Truck Drivers Local No. 449*, 353 U.S. 87, held that in case of a strike against one member of a multi-employer bargaining unit the other members may lock out their employees as a means of preserving the integrity of the multi-employer unit. In that case the Board concluded that in the interest of preserving multi-employer bargaining an employer might engage in certain conduct which would literally "interfere" with concerted activities and result in "discrimination" against union members. This Court sustained the Board's reasoned accommodation of legitimate conflicting interests of employers and employees.

In the present case the Board again evaluated the competing interests in multi-employer bargaining and concluded that, although respondents were entitled to lock out their employees when the Union struck Food Jet, they went beyond defense of the multi-employer unit and violated rights guaranteed by Section 7 of the Act when they resumed operations not with their regular employees, who were ready and willing to work, but with temporary replacements.

This conclusion was sound. Respondents could have preserved the solidarity of the multi-employer unit and put themselves "in the same boat" as Food Jet by resuming their operations with their own regular employees—either in full or in such numbers as to maintain a level of operations similar to that of the struck employer. By replacing employees who were ready to work, respondents engaged in conduct that was retaliatory rather than defensive.

In effect, the court of appeals undertook its own appraisal and accommodation of the conflicting interests and substituted its judgment for that of the Board. This substitution of a judicial evaluation for the expert judgment of the statutory agency exceeded the court's authority under established principles announced by this Court.

ARGUMENT

THE COURT OF APPEALS EXCEEDED THE AUTHORIZED SCOPE OF JUDICIAL REVIEW BY REVERSING THE ADMINISTRATIVE ACCOMMODATION OF COMPETING INTERESTS.

Our basic argument is that the court of appeals exceed the authorized scope of judicial review in reversing the Board's holding that the other members of a multi-employer bargaining unit commit an unfair labor practice if they respond to a strike against one employer by dismissing their non-striking employees for the duration of the strike and continue operations with replacements even though their regular employees are willing and able to work. We show first, by analyzing the competing interests of employers and employees involved in this question, that the Board achieved the correct accommodation of the competing interests. We then point out that mere disagreement

with the Board would not justify setting aside its order because the Board's accommodation, being reasonable, is binding on judicial review.

A. THE BOARD APPLIED THE STATUTE IN A WAY WHICH ACHIEVED A SOUND ACCOMMODATION OF THE COMPETING INTERESTS OF EMPLOYERS AND EMPLOYEES IN MULTI-EMPLOYER BARGAINING.

Like *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87 [hereinafter "*Truck Drivers*"], this case involves the scope of permissible response by members of a multi-employer bargaining unit to a strike by the union against one member of the unit. In the *Truck Drivers* case the question was whether the non-struck members had committed an unfair labor practice by temporarily locking out their employees during contract negotiations in response to the union's strike against one of the employer members of the unit. Such a lockout literally "interferes with" the employees' right to engage in "concerted activities" (Sections 7 and 8 (a)(1), pp. 2-3, *supra*), for it deprives non-striking employees of available work which they are willing to do, thereby enlarging the area of economic combat staked out by their bargaining representative. By depriving non-striking employees of employment because of the action taken by their union against some other employer, such a lockout also constitutes "discrimination" tending to discourage the employees from supporting the union in the future (Section 8 (a)(3), p. 3, *supra*). On the other hand, a strike against one member of a multi-employer bargaining unit seeks to use the sales and services of the remaining members to increase the pressure upon the struck employer to capitulate to the union's demand by threat-

ening him with a permanent loss of customers. Moreover, a strike against one member carries an implied threat of successive strikes against each of the other firms individually, with "the calculated purpose" of causing "successive and individual employer capitulations" (*Buffalo Linen Supply Co.*, 109 NLRB 447, 448). This whipsawing technique would destroy the integrity of the multi-employer bargaining unit.

In the *Truck Drivers* case the Board balanced these competing considerations and concluded that the employers' interest in preserving the integrity of the multi-employer unit outweighed the interest of the employees. Hence, notwithstanding the fact that such conduct might violate the Act if construed literally, the Board held that the non-struck members of a multi-employer unit could lawfully lock out their employees as a defense to a strike against one member of the unit. *Buffalo Linen Supply Co.*, 109 NLRB 447. In reviewing the Board's decision, which had been reversed by the Court of Appeals for the Second Circuit, 231 F. 2d 110, this Court recognized that, although "the Act protects the right to strike * * * this protection is not so absolute as to deny self-help by employers when legitimate interests of employers and employees collide. * * * The ultimate problem is the balancing of the conflicting legitimate interests," and that function "Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." 353 U.S. at 96. Accordingly, having determined that the Board had "correctly balanced the conflicting interests" (353 U.S. at 97), this Court sustained the Board's decision.

The present case concerns a situation in which the Board was required, as in *Truck Drivers*, to balance competing interests. When the Union struck Food Jet (one employer in the bargaining unit), the others —*i.e.*, respondents—were entitled under the *Truck Drivers* decision to lock out their own employees and thereby treat the strike against Food Jet as a strike against all employers in the unit.[1] This privilege continued even after Food Jet attempted to resume its own operations. But the balance shifted considerably when respondents resumed operations not with their regular employees—who were available and willing to work—but with supervisory personnel, relatives of management, new employees hired on a temporary basis, and others—all of whose sole virtue apparently was that they had no connection with the Union.

Preliminarily, it should be noted that the replacement of regular employees under these circumstances is obviously a literal violation of the Act and, absent overriding justification, would plainly constitute an unfair labor practice under the applicable decisions of the Board and the courts. Regardless of respondents' motives, the continued layoff of available regular employees in favor of newcomers can only be viewed as reprisal for the Union's strike against Food Jet.[2]

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[1] Accordingly, the Board did not disturb the conclusion of the trial examiner (R. 8-9, 23-24) that the initial lockout by the stores was lawful.

[2] As the Court observed in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221-228:

> The employer * * * must be held to intend the very consequences which foreseeably and inescapably flow from

The Board observed that, "since no reason appears why they [the nonstruck stores] could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, *i.e.*, striking against Food Jet" (R. 25). Manifestly, such action constitutes a form of "discrimination" and "interference" barred by the statute.

Moreover, it has long been settled that an employer violates Sections 8(a)(1) and (3) of the Act if he denies an ex-striker an open position because he went on strike.[3] Thus, even the struck employer, Food Jet, would have committed an unfair labor practice had it hired replacements in the place of strikers who were

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his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. * * * But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights * * *. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. * * *

[3] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 749 (C.A. 9); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4); *National Labor Relations Board* v. *National Shirt Shops*, 212 F. 2d 491, 494 (C.A. 5); *National Labor Relations Board* v. *J. Mitchko, Inc.*, 284 F. 2d 573, 576-577 (C.A. 3).

willing to return to work.[4] *A fortiori* the discrimination is unfair when employees who are willing to work are replaced because their union has called a strike against another concern. And, while the effects of the discrimination may be less damaging if the replacement is temporary rather than permanent, either reprisal obviously puts pressure on the employees and constitutes interference within the meaning of the Act.

Consequently, the issue which the Board had to resolve in this case was whether the policy of preserving the integrity of the multi-employer bargaining unit, which was deemed sufficient in the *Truck Drivers* case to override the coercion and permit the non-struck employers to shut down their operations, would also justify such employers in replacing their regular employees with temporary substitutes while continuing to operate the businesses. The Board held, "in balancing the conflicting interests" (R. 25), that such replacement was "retaliatory" rather than "defensive" (R. 27) since less drastic means were available to preserve the integrity of the bargaining unit.

The Board's view is that, when one employer is struck, the remaining employers in the unit may lock out their employees whether or not the struck employer resumes operations with replacements. If the struck employer is then able to conduct business operations with replacements notwithstanding the

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[4] However, if Food Jet permanently replaced a striker before he manifested an intention to return to work, the striker would not be entitled to his old job were he later to request it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345.

picketing by his regular employees, the non-struck employers may, of course, find that they are losing customers by remaining closed; the continued operations of the struck employer might exert pressure on them to make a separate settlement with the union, thereby imperiling the multi-employer bargaining unit. But their choice is not limited to remaining closed or hiring temporary replacements. They can protect themselves adequately and, at the same time, preserve the solidarity of the multi-employer unit, by resuming operations with all or some of their own employees who are willing and able to work. In short, the non-struck employer members of an association can put themselves "in the same boat" as the struck member by shutting down entirely or, if the struck employer has reopened, by resuming their own operations with their regular employees—either in full or to the extent deemed adequate to maintain a level of operations comparable to that of the struck employer.

As the Board stated in *The Kroger Company*, 145 NLRB No. 26, which involved a situation similar to the one here (mimeo dec., p. 5):

> We believe that the non-struck employer's legitimate interest is fully protected by giving him a choice between closing down or operating with those regular employees who are willing to work. Selection of the alternative is in the hands of the individual employer, and he may use his own judgment to determine which course he will pursue. The choice is his, whether the struck employer is able to function substantially as usual, or whether the struck employer is completely or virtually closed. In these circumstances there is in our opinion no valid reason why the non-struck

> employer should be entitled both to lock out his employees and continue to operate with temporary replacements for those employees * * *. [T]o permit the non-struck employer to operate with replacements while his own employees are willing to work, serves only to punish those employees because of their adherence to the striking union.

Respondents contend (Brief in Opposition, p. 11) that this accommodation of the competing interests in such circumstances is unfair because "it is simply impossible to completely shut down a retail grocery operation which necessarily maintains a large inventory of perishable merchandise." However, this consideration demonstrates only that in respondents' line of business a lockout may be more expensive as an employer weapon. That is, the argument assumes that, if a struck employer such as Food Jet were unable to hire replacements and resume operations, the other members of the multi-employer unit would be required by the unique nature of their business to remain open notwithstanding the effect this would have on the solidarity of the unit. The fact that Food Jet has succeeded in hiring replacements should surely not entitle the other employers to remedy this divisive factor inherent in the nature of their business at the expense of their regular employees.

Respondents also assert that the alternative of resuming operations with a full or partial staff of their own employees is unrealistic because "there is obviously no economic parity between an employer who is attempting to operate a store while being picketed by a union and an employer who is not being picketed" (Brief in Opposition, p. 11). This argument

assumes, however, that the Union (1) will picket the non-struck employers' stores if replacements are hired and (2) will not picket if any regular employees are retained. Both assumptions are speculative, and neither is supported by a reasoned forecast of probabilities. For if the Union originally determined to strike a single employer rather than all the employers in the unit, it might well conclude that the same policy warranted picketing no one but that employer even if his competitors were to hire replacements. Otherwise, its selective strike would produce the same result as a general strike—all stores will be operating with replacements and all will be picketed.[5] And, while the Union would have no reason to picket the non-struck employers if they retained their full regular work force, it might well engage in picketing if the non-struck employers responded by keeping only skeleton staffs for the duration of the strike. For if the Union is prepared to abandon its selective strike technique and picket all stores if replacements are hired, it might also follow the same course if a substantial portion of the regular work force of the non-struck employers were laid off.

There is no merit to respondents' suggestion that retention of only some of the non-struck employers' regular employees "would force the employer to make an inherently discriminatory selection as to which

[5] It is true, of course, that, by shifting the initiative to the non-struck employers, the Union is spared the public criticism which might result if it called a general strike against all employers in the unit—which are grocery stores in the present case. But if the hiring of replacements is foreseeable (and the perishable nature of the groceries' stock indicates it would be), then such criticism may be minimal.

employees to lay off because of union activities" (Brief in Opposition, p. 11). If all the non-struck employers' regular employees are union members, a layoff of some of those employees, prompted not by anti-union considerations but by a reduction in operations to the level of the struck employer, would not violate the Act any more than would a total layoff—which is permitted by the *Truck Drivers* case. Nor would such a partial layoff be unlawful if some of the regular employees of non-struck stores are not union members. So long as the employers selected the employees to be laid off on the basis of objective factors, such as seniority, and not on the basis of union membership or activity, no charge of illegal discrimination could be made.

Nor is there any substance to the court of appeals' suggestion that the non-struck employers' right to hire temporary replacements necessarily followed from the right recognized in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, to hire replacements for strikers (R. 73-74). The right recognized by *Mackay* is limited to hiring permanent substitutes for employees who insist upon staying on strike; it does not permit the employer to replace an employee who is willing and able to work.* In this respect, the struck employer

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* *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Luzerne Hide & Tallow*, 188 F. 2d 439, 442 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Anchor Rome Mills*, 228 F. 2d 775, 780 (C.A. 5); *National Labor Relations Board* v. *Robinson Freight Lines*, 251 F. 2d 639, 641 (C.A. 6); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10).

differs from the others in the multi-employer unit. His employees, being on strike, are not willing and able to work. He can run his business only by hiring replacements for those employees, and this *Mackay* permits him to do. The employees of the non-struck employers, on the other hand, are all willing and able to work. If they do not work, it is only because they have been locked out. In these circumstances, there is no need for the non-struck employers to hire replacements in order to operate, and *Mackay* does not accord them any such privilege.[7] Indeed, as has been shown (p. 11, *supra*), the struck employer himself would have no privilege to replace an employee who was willing and able to work.

Similarly without substance is the court's further suggestion (R. 73-74) that to deny the non-struck employers the right to hire replacements when the struck employer resumes operations with replacements renders illusory the right to lockout which *Truck Drivers*, *supra*, accords them. As shown above (pp. 9-10, 12, *supra*), the Board's view permits the non-struck employers in the unit to lock out when one of their unit members has been struck, and they may continue the lockout *whether or not* the struck employer resumes operations with replacements.

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[7] Contrary to the view of the dissenting Board members (R. 30), it is not misleading to say that regular employees of the non-struck members are willing and able to work. Though their fellow employees are striking for a better contract which may redound to the benefit of the non-struck employees, the latter are willing, in the meantime, to continue working for their employers under the existing terms and conditions of employment.

B. IN ANY EVENT, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE BOARD UPON AN ISSUE ENTRUSTED BY THE STATUTE TO THE BOARD'S DETERMINATION.

As the above analysis demonstrates, the issue presented by this case involves a careful balancing of conflicting interests. The distinction drawn by the Board between defensive lockouts and reprisals in the form of temporary replacement is precisely the kind of delicate accommodation which the Board was established to achieve on the basis of its expert knowledge and its awareness of the practical consequences of action taken by the employer or the union. It is a task which is not new to the Board, for it arises in a variety of contexts in the administration of the Act. An employer may, for example, permanently replace economic strikers although such action would tend to deter employees from exercising their statutory right to strike (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345), but he may not offer superseniority to replacements for strikers and to strikers who are willing to abandon the strike even if his motive is merely to obtain enough workers to run his business (*National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221).[8]

---

[8] Compare also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (unlawful to ban literature distribution and union solicitation by *employees* on plant property during non-working time), with *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (not unlawful to ban literature distribution on plant property by *non-employee* organizers).

In this case, as in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236, it is the courts' obligation to "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, * * * and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.'" As in the *Truck Drivers* case, 353 U.S. at 96, "[t]he ultimate problem is the balancing of the conflicting legitimate interests," in which the courts' function is to exercise only "limited judicial review."

We submit, for the reasons stated above, that the Board's conclusion in the present case is eminently sound. Even if one should disagree, however, that would not justify the decision below. The balance struck by the Board, being at worst a not unreasonable application of the statute, is within its authority, and the court of appeals exceeded its power in substituting its own judgment for that of the Board.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause remanded with instructions to enter a decree enforcing the order of the Board.

Respectfully submitted,

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AUGUST 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 739598 85

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 7

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JOHN BROWN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RETAIL CLERKS INTERNATIONAL ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION

This brief *amicus curiae* is filed by the Retail Clerks International Association (hereafter, "RCIA") with the consent of the parties.

The RCIA is an international labor organization whose 400,000 members work in retail stores throughout the United States and Canada. It is the parent body of RCIA Local 462 which initiated this case by filing unfair labor practice charges with the National Labor Relations Board (R. 4). In addition to the case at bar, local unions of the RCIA have been parties in two other recent lockout-replace-

ment cases before the National Labor Relations Board. *Industrial Conference Board*, 141 NLRB 625, *enforced in part, juris. reserved in part*, 327 F. 2d 888 (D.C. Cir.); *Food Giant Super Markets*, 145 NLRB No. 124. As is evident, therefore, the RCIA's members have been affected with especial severity by the unfair labor practice being reviewed here, for it is a labor relations weapon which has so far been utilized only by retail employers.[1]

Labor relations in the retail industry are characterized by multi-employer bargaining. Whether nonstruck employers may respond to a strike against one employer in a multi-employer group by locking out and then replacing nonstriking employees is a question of surpassing importance to labor relations in this industry.

The brief for the National Labor Relations Board deals with the two main legal issues of this case thoroughly and ably. First, it demonstrates that the lockout of bargaining unit employees by nonstruck employers, who continue to operate with replacements and supervisors, is discriminatory and coercive of employees in violation of rights guaranteed by Section 7 of the Labor Act, 29 U.S.C. 157, 16 Stat. 136 (Pet. Br., 8-17). Second, it shows that the Court of Appeals exceeded its reviewing authority by reversing the National Labor Relations Board's exercise of informed discretion in "balancing . . . the conflicting legitimate interests" of employees and nonstruck employers who are parties to multi-employer bargaining (Pet. Br., 18-19). *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 96.

As we are in full accord with the legal arguments made in petitioner's brief, we shall not burden the Court by restating them here. Instead, we shall deal with several arguments of policy and labor relations practice which underbrace petitioner's arguments.

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[1] *Industrial Conference Board, supra; Food Giant Super Markets, supra; The Kroger Co.*, 145 NLRB No. 26, 54 LRRM 1361; *Bagdad Bowling Alleys*, 147 NLRB No. 97, 56 LRRM 1301.

ARGUMENT

I. The Decision Below is Inimical to the National Labor Policy.

As the statute provides and as the Court has observed, the "fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 237. The decision of the Court of Appeals treats the important issues in this case in the spirit of private commercial litigation, ignoring the underlying statutory purpose and public policy. See *Garner* v. *Teamsters,* 346 U.S. 485, 492-499.

In a crucial and revealing sentence, the Court of Appeals charges that the Board's decision "denies the *privilege of lockout* and . . . refuses any consideration of the existence of the *overriding business purpose* which . . . may justify the invasion of *union rights*" (R. 75; emphasis added). This statement exposes the errors of philosophy and legal analysis in that decision.

First, the court below was wrong in asserting that the Labor Act confers a "privilege of lockout" on employers as a collective bargaining stratagem. It is at most a limited "defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." *NLRB* v. *Truck Drivers, Local No. 449,* 353 U.S. 87, 93. That case, *Buffalo Linen,* created no such monster of mechanical jurisprudence as an automatic "privilege of lockout" and "right of replacement" (R. 74-75) whenever one employer is struck in a multi-employer unit, but the Court there ruled that the Board was authorized to balance conflicting interests of employees and employers where a whipsaw strike threatens the continuation of multi-employer bargaining. *Ibid,* 96-97.

The court below simply did not fairly apply the rationale of *Buffalo Linen* that nonstruck employers have an interest in preventing a whipsaw strike's placing the struck em-

ployer at a serious competitive disadvantage. Where, as here, there is no evidence or finding that the struck employer has been put to any competitive disadvantage by a strike, there can be no justification for the lockout of employees of nonstruck employers, and *a fortiori* there can be no justification for the replacement of such employees.[2] Thus the fundamental error of the lower court's analysis is its narrow, distorted interpretation of *Buffalo Linen*.

Second, in the factual context of this case, there was no "overriding business purpose" (R. 75) nor indeed any business purpose which warranted the lockout of employees by the nonstruck employers. As the one struck employer continued to operate with replacements throughout the strike, there was no economic pressure on him to break from the multi-employer group, and there was no warrant for the other employers, therefore, to lockout their employees. But even if the strike against a single employer who continues to operate warrants a lockout by nonstruck employers, it does not follow that the nonstruck employers are further warranted in replacing their employees. The Court of Appeals' suggestion that there was an "overriding business purpose" which warranted both the lockout *and* the replacement of locked out employees is simply contrary to fact.

Third, the lower court's juxtaposition of an employer's "business purpose" with "union rights" (R. 75) misunderstands the economic balance which the Board is required

---

[2] Unlike petitioner, who says that the Board did not disturb the Trial Examiner's finding that the initial lockout by the nonstruck stores was lawful (Pet. Br., p. 10, n. 1), we think the Board did rule that the lockout *as well as* the replacements was unlawful here. The Board's decision carefully noted the Trial Examiner's ultimate conclusion, not his finding on this point. Thus, the Board said: "We agree with the Trial Examiner's *conclusion* that the nonstruck employers violated the Act by *locking out* their employees in the circumstances involved here" (R. 24; emphasis added). It was not merely the replacement of locked out employees which the Board said was unlawful but also the lockout itself.

to strike. It is the right of *employees* which Section 7 protects, not the right of unions or employers. The Board correctly noted that a lockout is a "drastic form of discrimination" against employees, and it found that the nonstruck employers "were not justified in replacing their employees" because of a strike called by their union against another employer (R. 25). Viewing the issues here as merely an economic struggle between a union and employers is simplistic, for this is not the legal focus of the Act. Not surprisingly, therefore, the decision of the Court of Appeals reaches a result which is discordant with the policies of the Act.

The decision below may be reduced to this formula: whenever a union strikes one member of a multi-employer group (whether or not the struck employer continues to operate), all other employers are privileged not only to lockout their employees but also to replace them and to continue normal business operations. This result, we think, is profoundly contrary to the plain meaning of Section 7 and to the national labor policy. An automatic right of lockout and replacement will produce more, not less, industrial strife, for inevitably labor disputes will be broadened in their scope and perhaps in their duration, too.[8] In the instant case, for example, what began as a strike against a single employer was converted—by the exercise of such a purported right of lockout and replacement—into an industry-wide, community-wide dispute.

From the enactment of the Labor Act in 1935 until announcement of the decision below in 1963, there were no strike-lockout-replacement cases like this one. Immediately after the Tenth Circuit's decision was reported, however, a number of such lockout-replacement cases arose. (See

[8] Certainly the decision below literally violates the spirit and policy of Section 203(a) of the Labor Act which created the Federal Mediation and Conciliation Service "in order *to prevent or minimize interruptions* of the free flow of commerce growing out of labor disputes." (Emphasis added.)

footnote 1, *supra*.) Unless the decision below is reversed, it is inevitable that this pattern will be universally followed in multi-bargaining with portentous consequences for interstate commerce.

It seems quite likely that the decision below will both discourage participation in and increase tensions in multi-employer bargaining as an instituiton, for that decision radically alters the rules in favor of employers. Operating under the decision below, a union involved in multi-employer bargaining runs the risk that calling even an unsuccessful strike against a single employer may provoke not only an industry-wide lockout of all its members (the classical *Buffalo Linen* situation), but also that its nonstriking members may be replaced while their employers continue their business as usual.

Tensions in labor relations are never higher or more dangerous than when strike breakers are engaged to replace economic strikers, for the striker sees a complete stranger taking the job which he needs to support his family and in which he has an investment of time and skill.[4] The striker at least has exercised some choice in his course of conduct, for he is not required to strike. Indeed, Section 7 guarantees his right not to strike. But the nonstriker who is locked out and then replaced is completely the victim of his employer's economic aggression; he has had no choice. Understandably, therefore, such a labor dispute is calculated to be even more volcanic and intense than the economic strike in which an employer operates with strike breakers.

Unions have little to gain by engaging in multi-employer bargaining under such conditions, for employers in multi-employer bargaining would be able to act offensively and punitively against their employees in a way which the law does not permit individual employers—bargaining alone—

[4] The use of strike breakers is not infrequently the source of violence and other manifestations of industrial strife, for it produces an economic-psychological crisis of great intensity. See, e.g., *Automobile Workers* v. *Russell*, 356 U.S. 634.

to act. (See cases cited in Pet. Br., p. 11, n. 3.) It is fair to predict, therefore, that multi-employer bargaining—with its advantage to the community in terms of promoting stability and uniformity—cannot withstand this cold water shock to its somewhat delicate nervous system. But, if it survives, it must do so under augmented tensions and strains.

II. The Lockout and Replacement of Employees is Inherently an Offensive Action.

Except in the rarest cases, the distinction between "offensive" and "defensive" lockouts is tenuous. Our own considerable experience has been that the multi-employer lockout is invariably an offensive weapon intended to advance employers' collective bargaining objectives, not primarily to prevent atomization of multi-employer bargaining. *Buffalo Linen* has been the source of this mischief, for the Board has interpreted and applied it as conferring *ipso facto* permission on nonstruck employers to lockout their employees in response to a strike against a single employer, regardless of whether in fact such strike constitutes a threat to multi-employer bargaining. It is not very often that employers are so unwise or indiscreet as to admit that the true purpose of locking out their employees under such circumstances is "to enhance their bargaining position vis-a-vis the Union . . . [to] help bring down the Union's bargaining demands . . . [and] to increase the employers' bargaining strength with the Union." *Bagdad Bowling Alleys*, 147 NLRB No. 97, 56 LRRM 1301, 1302.

We think there cannot be the slightest doubt that the lockout *and* replacement of workers, who are perfectly ready and able to continue to work for their employers, is an offensive, punitive action. That a lockout and replacement sequentially follows a strike against a single employer does not mean it is a defensive action; this sequence merely creates a chronological pretext for the lockout and replacement. The Board was faultlessly accurate and realistic in

its conclusion in *The Kroger Co.*, 145 NLRB No. 26, 54 LRRM 1361, 1362:

> . . . there is . . . no valid reason why the non-struck employer should be entitled both to lock out his employees and continue to operate with temporary replacements for those employees. . . . [To] permit the non-struck employer to operate with replacements while his own employees are willing to work serves only to punish those employees because of their adherence to the striking union.

The court below stumbled in an analytical pitfall by failing to test the validity of the employers' lockout-replacement action here in the light of their avowed purpose. Their purpose, they said, was to preserve multi-employer bargaining from the effects of a whipsaw strike (R. 41). How then was the lockout and replacement of employees, who were willing to work, calculated to achieve *that* object? In other words, if their *true* purpose had been to avoid the adverse impact of a whipsaw strike on multi-employer bargaining, would it have made any difference whether they continued to operate with their own employees or with replacements? The answer is quite plainly "no," for their economic position vis-a-vis the single struck employer would be identical in either event.[5] It is only the locked out and replaced employees whose economic position and security are threatened in this situation.

In *Buffalo Linen* the Court said that, if a union which is party to multi-employer bargaining tries to pick off one

[5] We are not impressed with the argument that temporary replacements are necessarily less efficient than regular employees and, therefore, that productivity and profits for the nonstruck employer must be lower during the period that he has locked out and replaced his regular employees. This argument is of course wholly speculative. But it falls of its own weight when—as often is the case—replacements are paid less than the regular employees whom they replace. If the replacements are either supervisors or regular employees transferred from other locations, the argument similarly must fail.

employer at a time, the remaining employers need not sit by helplessly. Implicit in the fabric of that decision were two assumptions: first, that the struck employer has been forced to cease normal operations; second, that the nonstruck employers have ceased their normal operations in precisely the same way so as not to receive profits or other competitive advantage at the expense of the struck employer. Neither the holding nor the philosophy of *Buffalo Linen* is applicable to the instant case because neither factual assumption is present here. If either the struck employer or the nonstruck employers continues normal business operations, the lockout of employees is not economically justified as a defense to the strike, and the replacement of employees compounds the coercive, discriminatory nature of the lockout. See Brundage, The Lockout and Multi-Employer Bargaining, 14 Lab. L.J. 976, 983.

A danger in permitting nonstruck employers to lockout and replace their employees when one employer is struck is illustrated by *Food Giant Super Markets,* 145 NLRB No. No. 124, 55 LRRM 1146. There the union called a strike against a single food store employer in Tuscon. Fewer than twenty-five percent of that employer's employees went on strike, and in consequence the struck employer was able to continue his normal business operations. Nevertheless, each nonstruck employer in the unit locked out and replaced his employees, while continuing to do business with replacements, allegedly "in defense" against the union's strike. In such circumstances can it be realistically said that the lockout and replacement was economically justified to prevent whipsawing?

One can easily imagine that a strike called against a single employer, which fails to bring more than a handful of employees away from their jobs, might be the pretext for locking out and replacing thousands of employees. But, as here, where the effect of the union's initial strike does not close the struck employer and the nonstruck employers' decision is to continue operations with replacements, the lock-

out-replacement action is "indistinguishable from the outright firing of union employees in violation of section 8(a)(3)." 76 Harv. L. Rev. 1494, 1497.

CONCLUSION

For these reasons and the reasons stated in the brief for the National Labor Relations Board, the judgment below should be reversed with instructions to enforce the Board's order.

Respectfully submitted,

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August 25, 1964.

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No. 7

In the

Supreme Court of the United States

OCTOBER TERM, 1964

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

JOHN BROWN, ET AL, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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Petitioner,

v.

JOHN BROWN, ET AL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 69-77) is reported at 319 F. 2d 7. The decision and order of the Board (R. 22-30, 4-19) are reported at 137 NLRB 73.

JURISDICTION

The judgement of the Court of Appeals was entered on June 17, 1963 (R. 77). The petition for a writ of certiorari was filed on October 16, 1963, and was granted on January 6, 1964, 375 U.S. 962 (R. 79). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1.

Whether the Board exceeded the authority delegated to it by Congress in dictating to employer-members of a multi-employer bargaining group what economic devices were available to them in defending the integrity of their bargaining unit against a whipsaw strike.

2.

Whether the Board, in fact, properly balanced the conflict of interests between employer-members of the bargaining unit and the Union in finding that the respondent employers committed an unfair labor practice in (a) locking out their regular employees in the bargaining unit after one of their members had been struck and picketed by the Union, and (b) reopening their places of business on a limited basis after the struck member had done so.

3.

Whether, assuming the Court upholds the Board's conclusions, the Board's order is too broad because it imposes upon respondents the obligation to pay full back pay to all employees locked out rather than directing the payment of back pay only for those employees actually replaced in their jobs during the lockout.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

A. The Board's Findings of Fact

The brief for the National Labor Relations Board correctly summarizes the Board's findings of fact. By way of

addition, respondents would like to emphasize, however, that respondent Safeway Stores, Incorporated, which operates two stores in Carlsbad, New Mexico, closed one of its stores for nine days during the strike and lockout and transferred managerial personnel from that store to its store which remained open during the strike and the lockout (R. 50). Respondent Brown Food Store did not hire any outside temporary replacements at all, but relied exclusively on what help could be obtained from relatives of managerial employees, plus one "sack boy" transferred to Brown's Carlsbad, New Mexico, store from his Loving, New Mexico store (R. 43). Respondent Cashway did not hire any temporary employees, but relied exclusively upon managerial employees and their relatives and personnel transferred to Carlsbad from other nearby areas for the duration of the lockout (R. 55-56). Respondent Thrifty Way Food Stores principally utilized managerial personnel and their wives and part time "box boys," many of whom were employed in this respondent's stores prior to the strike and lockout (R. 60-62).

Respondents would also like to emphasize that the Union and respondents have entered into prior successive contracts and that "The relationship between the contracting parties has always been an amicable one, and their contracts have contained union shop provisions." (R. 23). "Throughout the strike and lockout the Respondents continued in effect all employee benefits in behalf of their regular employees." (R. 23).

B. The Board's Decision and Order

The Board, with two dissenting members, concluded that the non-struck employers violated Section 8 (a) (1) and (3) of the Act in locking out their employees and using temporary replacements for the duration of the strike. The Board stated:

> "The Trial Examiner found that the initial lockout by the nonstruck employers was a permissible defensive measure to protect the solidarity of the multiemployer unit under the rule of Buffalo Linen Supply Company. However, he reasoned that the additional action of those employers in continuing to operate their businesses during the lockout had upset the delicate balancing of interests struck in the Buffalo Linen case and hence was not privileged under that decision. He therefore concluded that by continuing to operate durgin the period of the lockout, the nonstruck employers discriminated in regard to the hire and tenure of employment of their lock-out employees to discourage membership in the Union in violation of Section 8(a) (3) and (1) of the Act and that the lockout was thereby rendered unlawful. We agree with the Trial Examiner's conclusion that the nonstruck employers violated the Act by locking out their employees in the circumstances involved here." (R. 23-24).

The Board ordered respondents to cease and desist from their unfair labor practices and to reimburse their employees for lost pay (R. 27, 12-13).

C. The Decision of the Court of Appeals

The brief for the Board correctly summarizes the decision of the Tenth Circuit Court of Appeals.

QUESTION ONE RESTATED

Whether the Board exceeded the authority delegated to it by Congress in dictating to employer-members of a multi-employer bargaining group what economic devices were available to them in defending the integrity of their bargaining unit against a whipsaw strike.

SUMMARY OF ARGUMENT

The effect of the Board's decision is to grant a privileged status to the whipsaw strike. The Board states that the respondents, to resist the impact of a whipsaw strike on the integrity of the multi-employer bargaining unit, could either continue to operate their businesses with their regular employees or close down their businesses for the duration of the strike. While the Board correctly recognizes that employers may use "self help" in defense of an economic strike, it erroneously limits the employers to a choice between equally unacceptable courses of conduct.

Rather than choosing from the alternatives stated by the Board, respondents took steps calculated to strike a balance between their need to protect their investments, their obligations to the community and their obligations to their employees. In doing this, respondents did no more than protect themselves from the Union's strike. They did not act discriminatorily. Their actions were no more than were required under the circumstances.

The respondents here engaged in permissible "self help" which conduct has been recognized as proper by the Board

and the courts. In holding that the respondents could not act as they acted here, the Board is actually "picking and choosing" the economic weapons available to employers who are in the position of having to defend their bargaining units from a strike. The respondents acted solely to protect their unit and their legitimate business interests by taking minimal steps to keep their businesses open on a limited basis.

ARGUMENT

A. The Board's Decision grants a preferred status to a whipsaw strike.

The effect of the Board's decision is to grant a privileged status to a "whipsaw" strike and a legislatively unauthorized economic advantage to unions and their members. As a result of the Board's decision these respondents, and hence employer-members of other multi-employer bargaining units, are denied the right to defend against a whipsaw strike effectively, unless they are willing to risk their accumulated business investments or a permanent loss of business.

The Board's brief suggests that respondents, on the facts here, could have done one of two things: (1) Remain open with their regular employees and thus bear the brunt of the whipsaw strike intended to atomize the bargaining unit and paralyze them economically; or (2) remain closed, although the struck employer continued his business operations, thus risking a permanent loss of business and a complete loss of their perishable inventories. What choice is this? Respondents' position can be stated simply: when a struck employer-

member of a multi-employer bargaining unit utilizes replacement personnel to resist the economic consequences of a strike, and to protect his investment in his inventory, other employer members of the same bargaining unit who have lawfully locked out their employees must also be permitted to use other reasonable "self help" necessary to protect their legitimate business interests and the solidarity of the bargaining unit.

In its brief filed with this Court the Board for the first time in this case concedes the right of respondents and other members of multi-employer units to use "self help" to resist the impact of a whipsaw strike directed at the bargaining unit. This case, then, is concerned with what types of "self help" are permissible. The question to be answered is whether the Board has the right to tell employers what "self help" devices they may use in trying to maintain the integrity of their bargaining unit, absent a showing of an intention to discriminate. Respondents submit that the Board does not have this authority under the Act.

Respondents here advised the Union representatives, after having been told that the Union members had voted to strike (but not having been told which respondents might be struck or when the strike would occur), that "a strike against one was a strike against all". When Food Jet was struck, respondents locked out their employees in the bargaining unit. Had the sequence of events stopped here, this action would undoubtedly have been upheld by the Board under the rule laid down by this Court in *NLRB v. Truckdrivers Local No. 449*, 353 U.S. 87 (*Buffalo Linen*). But

Food Jet chose to defend against the strike by continuing to operate its business with temporary replacements.[1] Respondents and the Board agree that they then had the right to take action designed to place themselves "in the same boat" as the struck employer.

What then might respondents do? The Board states that:

(1) The respondents could remain closed, thus risking a permanent loss of business. This grants a substantial advantage to the struck employer thereby weakening the solidarity of the multi-employer bargaining unit, because the employer members are competitors. If non-struck employers had to remain closed while one or more of their competitor members who were struck could continue to operate, the bargaining unit would be subjected to great pressure because there would be little economic reason for the employers remaining open to negotiate as a unit while enjoying the favored position.

(2) The respondents could remain open and continue operating their businesses, while waiting to see who would be the next victim of the whipsaw strike. This, too, gives a preferred status to the whipsaw strike. Here, the whipsaw has an almost inescapable prospect of success, for working employees may subsidize their striking brothers, or await the time when, for a short while, they may be out on strike, in which case they would be subsidized by those in the unit

[1] The economics of the food industry decreed this. All grocers maintain large inventories of perishable produce, meat and dairy products. Total work stoppage for even one day would result in the loss, through spoilage, of part of this inventory. Prolonged cessation of business would cause the food store to lose all its investment in perishables, a circumstance which would be economically disastrous.

continuing to work. In practice, if the employers are required to permit their employees to continue working, they are placed in the position of financing the strike against themselves.

Laying aside considerations of policy for a moment and considering these choices from a logical point of view, respondents think that even the Board must admit there is something odd in its suggesting that they do one of two things, either of which will probably insure the Union's victory. The Board's "boat" would let the respondents sail between Scylla and Charybdis into a stone wall: they could not go forward, and they dare not go to either side.

B. The actions of respondents were calculated to protect their investments and the solidarity of the bargaining unit.

Respondents chose neither course suggested by the Board. Instead, they individually took steps calculated to strike a balance between their need to protect their investments, their obligations to the community which depended on them to supply it with food, and their obligations under the law not to treat their employees discriminatorily. Of utmost significance is the fact that respondents did not, on a man for man basis, replace their locked out employees by hire or otherwise. They used managerial employees already on their payrolls, wives of owners or managerial employees (who could hardly be said to be uninterested in the preservation of the businesses) and in a very few instances, temporary help. Respondent Safeway closed one of its stores and

transferred managerial personnel from that store to the one which remained open. Respondents Brown and Cashway hired no new outside clerical personnel at all but remained open only by using the services of managerial employees and their wives and, in Brown's case, by transferring one employee from his Loving, New Mexico store to his Carlsbad store. The Board's brief, by contrast, contains many suggestions that all or many of the locked out employees were replaced. Indeed, it leaves the impression that virtually all of the respondents' employees were "dismissed" and replaced and that respondents enjoyed business as usual. The record simply does not show this to be the case. This Court should not make the error, as did the Board, of equating the fact of remaining open with the conclusion that all the locked out employees were replaced. This was not done.

The controlling principle which the Board refuses to recognize is that the strike was directed against the integrity of the bargaining unit. According to statements made to respondents, the Union members had voted to strike. Unquestionably, the strike was aimed at the unit, seeking its destruction and the economic paralysis of its members. The objective of any whipsaw strike is to cause the employer-members the maximum amount of harassment, to create the greatest degree of pressure, and to cause the greatest amount of economic loss to them with the minimum amount of inconvenience and loss to the union and its members. If not effectively resisted, the whipsaw strike places the employers in the intolerable position of financing the strike aimed at the destruction of their unit. Is it any wonder that for years

it has been a favorite vehicle of unions? With this type of advantage, the strike must succeed. Was this advantage built into the Act by Congress? If not, can the Board by professing to balance the conflicting interests determine what economic weapons are available to employers to defend themselves against a whipsaw strike?

The Board's position is wholly unrealistic. The economic weapon employed here is the whipsaw strike. The destruction of the bargaining unit and the capitulation of the employers, either individually or collectively, to the economic demands of the union and its members are its objects. The members of the union vote whether to strike, when to strike and who to strike. They decide the strike strategy. They participate in daily strike activities. In these circumstances, it seems clear enough that the alternatives given should address themselves to the realities of collective bargaining and not simply present a Hobson's choice between equally unacceptable courses of conduct.

C. The Board and the Courts recognize the necessity of allowing employers the right to defend their businesses against a strike.

The principle of allowing an employer to choose the best method of defending against a strike has long been recognized and applied. In *Betts Cadillac Olds, Inc.*, 96 NLRB 268, at pp. 285-287 (1951) the Board recognized and applied the "self help" rationale:

> "An employer is not prohibited from taking reasonable measures, including closing down his plant, where such

> measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not wait to be struck before leaping for the curb. The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action. Manifestly, where there is no real strike threat, or when the Union has given reasonable assurance against a strike, or assurances of notice sufficient to avoid disruption, there is no objective need for protective measures. By the same token, requirements as to notice may also vary from case to case. Obviously *a produce merchant dealing in perishable commodities*, or a steel company requiring days of preparation for close-down, or the operator of a press-while-you-wait cleaning establishment, or a manufacturer of tombstones, are not in the same category. Some businesses may reasonably require assurances of some kind or of differing kind with respect to the completion of work in the shop, others may need none. These principles involving the balancing of factors whose weight, both absolutely and relatively, will vary according to the circumstances in which they occur, must necessarily await specific cases." (Emphasis added).

Other Board decisions similarly recognize that employers must resort to "self help" to defend against a strike. In *Central California Chapter, Associated General Contractors of America, Inc.* 105 NLRB 767 (1953), the Board found no illegality in shutdowns of "struck and nonstruck" projects

by general contractors because of "operational difficulties" and the inability to continue on "an [economical] basis". In *Packard Bell Electronics Corp.*, 130 NLRB 1122 (1961), the Board, relying on *Betts-Cadillac*, held that a manufacturer of T-V's, radios and electronic devices, faced with an imminent strike of its service department employees, could contract out its installation and repair work to avoid customers' sets being caught in the repair shop by the strike.

In *American Brake Shoe Co. v. N.L.R.B.*, 244 F. 2d 489 (1957), reversing 116 NLRB 820 (1956), the Court of Appeals for the Seventh Circuit held that a layoff and transfer of work to another plant in anticipation of a possible strike over new contract terms was privileged, the Court noting that the employer was faced with a "permanent loss of business" if the completion of orders was delayed by a strike.

It is significant to note that in *Packard Bell* and *American Brake Shoe*, the employers went beyond the point of a lockout and attempted to protect themselves from permanent economic harm. The actions of the employers in both cases were ultimately upheld. There are few if any basic differences between the objectives of the conduct of the employers in those instances and the objectives of respondents in this case.

The right to use "self help" is further defined in *Great Falls Employers' Council, Inc.*, 123 NLRB 974 (1959), reversed 277 F. 2d 772 (1960). In this case the Board majority held that members of the employers council violated the Act when, following a lockout, they rehired employees for

one day and then laid them off again to prevent them from drawing state unemployment benefits. The Board majority concluded that the rehiring converted the legal lockout into an illegal partial lockout.

The Ninth Circuit in reversing the Board stated at 277 F. 2d 772, 775-777:

> "We consider first the asserted violation of Sec. 8 (a) (3), that Respondent's conduct here had amounted to a practice 'by discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.' *The primary question here is, where is the discrimination?* The Board's decision furnishes no answer to this question, — it is not there discussed or even noticed. The employers' action in recalling their employees, and then releasing them was, as the Board's decision discloses, in no sense selective, — it operated as to all employees; none were preferred; none were excluded; all were treated alike. * * * [Emphasis added.]
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> "'The language of Sec. 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited.' *Radio Officers etc v. National Labor Relations Board*, 347 U.S. 17, 42, 74 S. Ct. 323, 337, 98 L. Ed. 455. Whether the conduct of these employers violated some other section of the Act is something we shall have occasion to consider later in this opinion. But so far as Sec. 8 (a) (3) is concerned, to treat this conduct as discretionary [sic-discriminatory?] action under that section finds no basis in reason or in precedent.
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> "In recognizing the propriety of the lockout, the Court in *National Labor Relations Board v. Truck Drivers*

Union, supra, 353 U.S. at page 93, 77 S. Ct. at page 646, noted that the employers were permitted to resort to it 'as an economic weapon.' By that economic weapon the employers undertook to see that the union members who were proposing to pick them off one at a time by the 'whipsaw' tactics were denied the opportunity to collect wages while they were doing this. Here, when the Board undertook to say that this economic weapon could not be made fully effective in the manner the respondents undertook to do, the Board was 'picking and choosing which economic devices of labor and management shall be branded as unlawful.' As the Court said of the Insurance Agents Union, 'the activities here involved have never been specifically outlawed by Congress.' (361 U.S. at page 498, 80 S. Ct. at page 431.) The Board here was moving 'into a new area of regulation which Congress had not committed to it.' (361 U.S. at page 499, 80 S. Ct. at page 433.) It was none of the business of the Board "to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "ballanced" state of collective bargaining.' (361 U.S. at page 500, 80 S. Ct. at page 433.)"

D. The Board has exceeded its authority by picking and choosing the economic weapons available to employers in defending their bargaining unit.

In *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, this Court affirmed the right of parties to labor negotiations to employ economic weapons of their choice while bargaining for the best terms available to them. This Court recognized that " 'collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics.' " *Id.* at p. 489, quoting Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev.

1401, 1409. This Court further recognized that only conduct specifically condemned by the Act was made the subject of the Board's sanctions. The principle announced there is also applicable here, because the Act nowhere attempts to delineate the economic defenses available to employers in resisting a lawful strike which is calculated to bring the employers' obstinance to an end:

> "We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has *in the statute* given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." *Id.* at p. 499 (Emphasis supplied)

Respondents, to combat a lawful strike, engaged in a lockout which is not condemned by the Act and which has been specifically held to be privileged conduct when taken in defense of a whipsaw strike. This being the case, absent considerations "of a stratagem or device to evade the policies of the Act", *Id.* at p. 499, the Board is without authority to brand the particular conduct of these respondents as unlawful.[2]

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[2] *Cf.* the comment of the Fifth Circuit Court of Appeals in *Florida East Coast Ry. Co. v. Brotherhood of RR Trainmen,* ..... F. 2d ..... August 8, 1964), reported at 33 L.W. 2113:

> "To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate."

Respondents submit that the Board majority was wrongfully "picking and choosing which economic devices" they could use to protect the bargaining unit from disintegration.

What did the respondents actually do to protect their unit and their legitimate business interests? First, they utilized managerial employees who were already on their payrolls. These personnel were "regular employees." Does the Board suggest that an employer cannot use such employees to resist the impact of a strike? Secondly, wives of owners and wives of managerial personnel worked during the lockout. They can hardly be viewed as "replacements." Some of them already performed regular services in respondents' stores; others relieved only a short time daily. Thirdly, part-time sack boys worked. Many of them were already on the payroll at the time the lockout occurred. Finally, a very few newly hired clerical replacements were used, where necessary, with the express understanding that their jobs would last only for the duration of the strike. If these actions can be branded illegal as constituting "offensive," "retaliatory" and "discriminatory conduct," then employer members of multi-employer bargaining units have no hope of resisting in any successful way the impact of a whipsaw strike aimed at the integrity of their unit. Their right to engage in "self help" is not merely illusory; it is nonexistent. Respondents urge that their individual actions in attempting to operate their stores during the period of the strike and lockout were reasonable and purely defensive in nature, were designed to enable employers to maintain a minimal, or at best limited, operational level

in their businesses, were completely justifiable for the economic preservation of their businesses, and were, indeed, necessary to service the community with food. These actions were not devices to evade the policies of the Act.

The Board, viewing the conduct otherwise, has taken the circumstances of *Buffalo Linen*—the fact that all employers remained closed—and has hardened it, in this case, into a rule of law; for the effect of the Board's decision is to deny employers the right to engage in "self help" and resist the impact of the whipsaw on the solidarity of the bargaining unit except by selecting from alternatives, all of which are calculated to insure the strike's success. This Court should uphold the Court of Appeals' refusal to enforce the Board's order and affirm the principle laid down in *Insurance Agents, supra*, that the Board does not have the authority to "pick and choose" the economic weapons which employers use in defending against a whipsaw strike, if the rights of employers to engage in "self help" are to have any substance.

QUESTION TWO RESTATED

Whether the Board, in fact, properly balanced the conflict of interests between employer-members of the bargaining unit and the Union in finding that the respondent employers committed an unfair labor practice in (a) locking out their regular employees in the bargaining unit after one of their members had been struck and picketed by the Union, and (b) reopening their places

of business on a limited basis after the struck member had done so.

SUMMARY OF ARGUMENT

Although primary responsibility for administration of the Act is vested in the Board, the courts retain the right to review the Board's decisions to determine their correctness. This Court, in fact, reviewed the Board's findings and conclusions in *Buffalo Linen* before approving them.

The Board has clearly failed to balance the conflicting interests in this instance because the Board held that the respondents' conduct was discriminatory without any evidence on which to base such holding. This expedient of holding conduct to be discriminatory *per se* is the antithesis of a judicious balancing of interests, for it did not permit respondents to offer evidence explaining and justifying their conduct.

However, even on the evidence before the Board, the conduct of these respondents was privileged under the rule laid down by this Court in *Buffalo Linen*. Respondents' actions were defensive in nature only. The Board's holding, in essence, refuses to recognize respondents' rights as stated in *Buffalo Linen*. Instead of according respondents their rights as set forth in that case, the Board has attempted to place on respondents the onerous burden of maintaining "economic parity" with each other and with struck employers. This "economic parity" theory is wholly unworkable.

ARGUMENT

A. The Board's decision is subject to judicial review.

The Board argues, at page 7 of its brief, that the Court of Appeals erred in substituting its judgment for that of the Board. According to it:

> "This substitution of a judicial evaluation for the expert judgment of the statutory agency exceeded the court's authority under established principles announced by the Court."

The Board's brief, at page 19, states:

> "* * * the Board's conclusion in the present case is eminently sound. Even if one should disagree, however, that would not justify the decision below. The balance struck by the Board, being at worst a not unreasonable application of the statute, is within its authority, and the court of appeals exceeded its power in substituting its own judgment for that of the Board."

It is thus the Board's position that once it has exercised its expert judgment and struck what it considers to be a proper and delicate balance, its decision, except to a very limited degree, is beyond the scope of judicial review of the Courts of Appeals and this Court. Here we are faced with the novel suggestion that whether the Board's decision is right or wrong, and regardless of the reasons for that decision, it is error for the courts to review or correct it. Of course, it is primarily the task of the Board to resolve conflicts between labor and management; but courts must necessarily retain the right to review the Board's actions, and they have never suggested that administrative expertise foreclosed their right—indeed their duty—to cor-

rect obvious errors committed by the Board in exercising its delegated authority.

The decision of this Court in *Buffalo Linen* discloses that it did not merely "rubber stamp" the Board's findings and conclusions. To the contrary, this Court in *Buffalo Linen* reviewed and found, in the context of that case, that the Board had properly balanced the conflicting interests. Furthermore, the question considered by the Court of Appeals below was whether the Board, in view of this Court's decision in *Insurance Agents*, supra, could dictate to the parties which economic weapons they could use. The Court of Appeals concluded:

> "that the Board has erred in its interpretation of *Buffalo Linen*, that the acts of respondents in hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive, that the order of the Board clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike" (R. 75).

B. The Board has not balanced the conflicting interests of employers and employees

The reason for the Board's decision is perhaps best revealed in this paragraph, quoted here from the Board's opinion:

> "That the nonstruck respondents, in replacing their employees, *may have acted in self-interest* rather than specifically to discourage union membership, or the Union's strike at Food Jet, *does not negate their un-*

> *lawful intent*. The Supreme Court in its recent Local 357 opinion thus took the occasion to reiterate its holding in Radio Officers that '[s]ome conduct may by its very nature contain the implications of the required intent [where] the natural foreseeable consequences of [the] actions * * * warrant the inference.'" (R. 25, emphasis supplied).

This is but another way of saying that the respondents' acts in continuing to operate their respective businesses were inherently discriminatory or, illegal, *per se*, or stated another way that respondents' *real motive* was to discriminate against their union member employees because that was the effect of their acts. To this conclusion and the Board's simple expedient of the *per se* finding respondents respectfully take exception.

Respondents suggest that this Court's *Local* 357 opinion referred to above (*Local* 357, *Etc. v. NLRB*, 365 U.S. 667) supports the rule that resort to a *per se* test of discrimination constitutes an entry by the Board into the Congressional domain:

> "Its [the Board's] power, so far as here relevant, is restricted to the elimination of discrimination * * * the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." *Id.* at p. 676.

The Board's decision and order, and the findings and conclusion of the trial examiner come to this: that a non-struck employer-member of a multi-employer bargaining unit who locks out his employees for the duration of an

economic strike against another memmber but who subsequently reopens his business on a limited basis after the struck employer itself has reopened is *conclusively presumed* to have acted discriminatorily *ab initio* toward his union member employees with a view toward discouraging their membership in the union, although, without question, the lockout standing alone is permissible conduct. Hence, evidence of motive, circumstances or reason for the action are of no consequence. In reply respondents ask: how can this conclusion be reconciled with the long history of union shop agreements in effect between the Union and these employers? How can this conclusion be reconciled with the decision to keep in force the employee benefits? How can this conclusion be reconciled with respondents' use only of managerial personnel, wives of managerial personnel, regular part time employees and in limited instances only, the hiring of a very few temporary employees expressly for the duration of the strike? How can this conclusion be reconciled with the admittedly limited nature of the respondents' operations during the lockout?

If ". . . the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized," (*NLRB v. Insurance Agents International, supra at* P. 489), then respondents' action, far from being discriminatory *per se*, is permissible conduct unless independent evidence of anti-union bias or conduct establishes the contrary. Here, an offer of evidence in explanation of the respondents' actions was dismissed with

the curt observation that it made no difference "[w]hether it was or would have been an economic disaster for them to operate otherwise." Some balance! How can the Board claim to have "delicately" balanced the conflicting interests when it has refused to permit, let alone consider, any evidence necessary to enable it to strike a balance. In *Leonard v. National Labor Relations Board*, 205 F. 2d 355, at 357, the Court of Appeals for the Ninth Circuit stated:

> "As stated by the Fifth Circuit in *N.L.R.B. v. Dorsey Trailers*, 179 F. 2d 589, 592, the Board "is no 'Poo Bah' to loose or bind at will." Congress made it an agency not as a labor board — created to aid labor in its struggle against the employer. As shown by its name, Congress created it to be a board concerned with the administration of labor relations in which the rights of the employer are to be as jealously guarded as those of the employee. We repeat the gustatory comment, erroneously attributed to Judge Learned Hand, that the Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act. *Capital Service, Inc. v. N.L.R.B.*, 9 Cir., 204 F. 2d 848, 853."

C. Respondents' actions were permissible conduct under the rule laid down in Buffalo Linen.

Respondents interpret *Buffalo Linen* to mean that where unions and their members have commenced a whipsaw strike, the members of the multi-employer group may resort to reasonable "self help" to preserve the integrity of the bargaining group, absent independent evidence of discrimination or coercion prohibited by the Act. Here there was no evidence whatsoever of any anti-union bias by

any respondent. Indeed, it is difficult to conceive of a case where relations between the employers and the union were more amicable.

The Board majority expressed its rationale for its *per se* finding of discrimination in this language:

> "If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn, could be driven to the wall in the 'whipsaw.' For this reason, if one member is shut down by a strike, the others may also shut down, but they are not required to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be *reasonable* [sic] inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory.'" (R. 26-27)

Let us examine the facts: Following the strike and lockout, and following the decision by Food Jet to replace its striking employees, the other employers continued to operate their stores on a limited basis. Safeway closed one store entirely, and operated another by transferring supervisory personnel from nearby stores; the other respondents remained open by using supervisory employees, relatives, and a few temporary employees hired only for the duration of the strike and lockout. The record, while not clear, indicates that from one to possibly four or five employees were temporarily hired *by all respondents* to work as

clerks during the period of the strike and lockout. The truth of the matter is that all respondents individually attempted to operate their respective stores on a make-shift basis. There is not a single suggestion in the record that respondents were acting in other than a purely defensive manner. Indeed, the locked out employees were told that they would be returned to their jobs when the strike was over, and the employees normally receiving fringe benefits continued to receive them during the entire course of the strike and lockout. Moreover, the record shows that "some of the businesses were down tremendously and perhaps there would be a good deal of time lapse before these normal businesses would be restored" after the termination of the strike (R. 65).

What is the conduct in this case which supports the conclusion of unlawful discrimination? There is none. As the dissenting opinion of members Rodgers and Fanning states:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8(a)(3), some form of *discrimination* must be found. The only conceivable discriminatory action in the present case, the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the *discrimination inherent in the original lockout was privileged.*" (R. 28-29, emphasis supplied)

Respondents submit that the use of temporary replacements, most of whom were supervisory employees and relatives of management, was not *per se*, "retaliatory" rather than "defensive." As stated in the concurring opinion in *Teamsters Local* 357 *v. NLRB*, 365 U.S. 667 (1961), where this Court struck down the expedient of the *per se* finding:

> "In general, this Court has assumed that a finding of a violation of Sec. 8(a)(3) or Sec. (b)(2) requires an affirmative showing of a motivation of encouraging or discouraging union status or activity. See, e.g., *NLRB v. Jones & L. Steel Corp.*, 301 U.S. 1, 45, 46, 81 L ed 893, 916, 57 S. Ct. 615, 108 ALR 1352; *Universal Camera Corp. v. NLRB* 340 U.S. 474, 95 L ed 456, 71 S. Ct. 456. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exceptions made to the requirements for a showing of discrimination in other contexts."

See also the decision in *N.L.R.B. v. Dalton Brick and Tile Corp.*, 301 F. 2d 886 (1962).

Under the rationale of *Buffalo Linen*, respondents' action in resorting to a lockout until termination of the strike was "defensive and privileged in nature, rather than retaliatory and unlawful." *N.L.R.B. v. Truckdrivers Local No.* 449, *supra* at p. 91. As stated by this Court in that case, "although the Act protects the right of the employees to strike in support of their demands, *this protection is not so absolute as to deny self help by employers when legitimate interests of employees and employers collide.*" *id.* at p. 96 (Emphasis supplied).

D. The Board's decision renders illusory respondents' right to lockout employees to preserve the integrity of the bargaining unit.

The action of Food Jet, the picketed employer, in hiring replacements for its employees who did not report for work, seems clearly privileged here. In *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, this Court laid down the principle that struck employers have a general right to hire replacements for strikers to "protect and continue" their businesses.

Food Jet thus chose to continue its operations with replacements, and the other respondents chose to lock out their employees to protect the integrity of the unit.[3] At this point, there was no violation of the Act. *N.L.R.B. v. Truckdrivers Local No. 449, supra*, at p. 87.[4] The Board, while recognizing the right of Food Jet to hire replacements and continue operating, reasoned that the other respondents could have continued to operate with their regular employees and that there was, therefore, no economic necessity for the other respondents to use temporary replacements. The Board thus concluded:

> "Locking out employees in order to replace them with other workers may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit. On the contrary, since the Respondents were continuing to operate and since

[3] It is noted that there were other employees in the stores who were not members of the bargaining unit who were not locked out.

[4] In its decision, the Board never conceded even that the initial lockout by respondents was legal. In fact the clear implication of the Board's decision is that the lockout followed by the use of temporary replacements converted the lockout itself into an illegal act.

> no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, i.e., striking against Food Jet." (R. 25).

As the Court of Appeals and the two dissenting Board members noted, this view "renders largely illusory the right of lockout given them by the Supreme Court in *Buffalo Linen*." Indeed, in the Board's view this right is rendered meaningless if respondents find they must, because of economic necessity, continue to operate.

It is obvious that if the struck employers may hire temporary replacements but the other employers must remain closed, the struck employer is given a significant economic advantage. The Board recognizes the problem, suggests that the cure is to continue operations with regular employees and embellishes its suggestion with the thought that there is really no economic reason for employers not to do this. This argument patently fails to take it into account that the respondents' decisions to remain open on a makeshift basis were made with a view toward protecting the bargaining unit as well as neutralizing their competitor's advantage. If respondents cannot lockout and use temporary replacements—at least to the extent done here—then the employers have no real protection from the effects of the whipsaw strike. To continue to operate during a whipsaw strike with regular employees obviously places the employers in the intolerable position of financing the strike which has as its objective the devastation of the bargaining

unit. Furthermore, as discussed more fully below, serious problems would arise if respondents attempted to continue operations with their regular employees. Would they be required to use all of their regular employees? If not, how is the selection to be made? Assuming these problems could be hurdled, moreover, an employer still would face the probability of being picketed with the result that its regular employees would leave, probably at a time of peak business activity. Restricting employers to the use of regular employees, who may be called out on strike or who would leave their jobs if the employer suddenly became the object of the whipsaw, would only add to the employer's problems in attempting to defend against it. The law permits the struck employer to engage in "self help" and to insulate its business from the worst effects of the whipsaw by allowing it to replace its striking employees; other members of a multi-employer bargaining unit against which a strike has been called, therefore should also be permitted to engage in "self help" and likewise to insulate themselves from the business destroying effects of the whipsaw. This simply cannot be done if the only way these employer members can operate their businesses is to attempt to do so with their regular employees.

It is obvious that an employer would be at the mercy of the union, particularly at peak business hours when the store is full of customers, if it must depend on the services of its regular employees in the event of a whipsaw. The same problem of course exists with respect to the stocking and protection of store inventories, the unloading of incoming

shipments, and the fulfillment of various kinds of contractual commitments. It is sheer folly to presume that an employer could continue to operate with this regular employees under such circumstances, particularly where the whipsaw—and it must be presumed that the union would use this vicious tool to its most effective and destructive end—might be shifted at short and varying intervals from employer to employer. How could an employer possibly protect himself under such circumstances if he had to depend wholly upon his regular employees, who, as members of the union, are not mere innocent bystanders but actual parties to the whipsaw strike against the employer group. There thus is sound economic reason for the non-struck employers not to operate with their regular employees.

E. The Board's "economic parity" theory is wholly unworkable.

In its decision and in its brief before the Court of Appeals, the Board took the position that respondents had the choice of either closing down completely or continuing normal operations. It now appears from its brief filed with this Court that the Board has reappraised the position of the non-struck members of a multi-employer group which is the object of a whipsaw strike and has "delicately" rebalanced the conflicting interests to some extent.

Thus, at this late date the Board for the first time suggests that each respondent could have operated on an

economic parity with the other respondents and with the struck employer. In the Board's language:

> "In short, the non-struck employer members of an association can put themselves "in the same boat" as the struck member by shutting down entirely or, if the struck employer has reopened, by resuming their own operations with their regular employees — *either in full or to the extent deemed adequate to maintain a level of operations comparable to that of the struck employer.*" (Brief, p. 13, emphasis supplied)

This grotesque over-simplification seems to demonstrate clearly the Board's utter failure to grasp the problems faced by employers who must defend their businesses against the whipsaw strike. A few questions immediately suggest themselves: (1) Who will determine the *adequacy* of the employer's response to the whipsaw strike? Will it be the employer? the Board? this Court? (2) What is a *comparable* level of operations? May the non-struck employers continue to work the number of employees which equals the number of replacements hired by the struck employer? Or should the non-struck employer guess at the level of sales of the struck employer and strive for a level of sales for himself which would leave each with the same percentage of the market enjoyed before the strike? Is gross profit of each employer a relevant factor? Is net profit? (3) Can the non-struck employers remain open their usual number of hours daily if the struck employer maintains his usual business hours? Or should all employer members of the bargaining unit remain open the same number of hours daily during the strike? (4) Would

the non-struck employers be permitted to use all of their employees on a part-time basis, thereby engaging in a partial lockout? Or must they use some of their employees on a full-time basis, which would, of course, still constitute a partial lockout? (5) May the non-struck employers rotate the employees working? Or *must they favor* certain employees and risk being charged with making a discriminatory selection? Is lack of anti-union bias a defense to such a charge? It is not hard to imagine that if a non-struck employer tried to remain open using only a few of his regular employees he would soon be a victim of the whipsaw picket line. Assuming, *arguendo*, that "economic parity" were in the realm of the possible, it could in all probability be attained only if the competitors made agreements and understandings between themselves which would violate the federal antitrust laws. See, for example, *Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc.*, 331 F. 2d 547 (C.A., 1964), where an agreement between food retailers fixing opening and closing hours was held to violate the Sherman Act.

An "economic parity" rule would in all probability require the number of employees used by the non-struck employers to change constantly depending upon the number of temporary employees working for the employer or employers being picketed. The problem is further compounded when more than one employer is picketed. How could the remaining non-struck employers ever arrive at any notion of parity? The Board completely ignores the fact that the picket line could, and probably would have shifted at short

intervals, possibly several times daily, with the only certainity being that the picketing would be at the inconvenience and hardship of the employers. It staggers the imagination to think of the problems involved in trying to determine and maintain "economic parity" in the face of a rapidly shifting picket corps. Economic parity would be nothing more than a game of musical chairs with the union playing the tune. It is demonstrably false to assume that economic parity could be maintained in the context of the shifting and changing whipsaw picketing tactics used against the members of a multi-employer bargaining unit.

Respondents submit that the yardstick to be used to measure the non-struck employers' conduct following a legal lockout is not the Board's concept of "economic parity" between the employers, who are, after all, commercial antagonists, but whether the employers have engaged in reasonable "self help." Respondents further submit that the facts clearly show that they did no more than that here.

> "It is apparent that the power of a union to initiate a strike which calls out all the employees in an entire or substantial part of an industry is no more than equalled by the power of the employers to lock out temporarily all or a substantial part of such employees." *Leonard, et al v. N.L.R.B.*, 205 F. 2d 355 (9th Cir.).

Respondents, with the exception of Safeway, were small, independent merchants. Each was faced with the necessity of protecting his perishable inventories, his business and the integrity of the bargaining unit, and more important, furnishing food to the community. Each, acting independently of the other, operated on a makeshift basis

as best he could, principally with supervisory help and relatives of management. Surely respondents' actions were "defensive" and not "retaliatory." The defense employed by respondents—the limited operation of their stores—was certainly moderate and reasonable. If respondents had waited to be "picked off" one at a time at the convenience of the Union, they would have, particularly in view of their perishable inventories, courted economic disaster.

F. Other considerations

There are, finally, other practical aspects of this case that the Board apparently did not take into consideration. What happens to other employees not in a bargaining unit if the employers must shut down their entire operations?[5] A complete shut down increases industrial strife and inflicts hardships upon people who are not parties to the labor dispute and who have no control over its settlement.

Many multi-employer groups have labor contracts covering various separate bargaining units, such as craft groups, maintenance employees, truck drivers, technical or professional employees performing specialized services or employees performing services in integrated or interdependent manufacturing operations—the number and kind of services are almost limitless. In many instances employers could not continue operations if they were re-

[5] In this case, neither meat department employees, nor supervisory personnel were members of the bargaining unit. All of these personnel continued to work during the lockout. Had respondents not continued operations, these employees would have been laid off and unable to work although they were not parties to the strike action and had no control over its settlement.

quired to lock out all employees in the bargaining unit and were prohibited from using temporary replacements. It would thus become necessary to shut down the operations of all employers in the unit, an act leading to the temporary unemployment of possibly hundreds or thousands of other employees who were not parties to the labor dispute and who had no control over its settlement. Such a result is, of course, opposed to the avowed objectives of the Wagner Act, Taft-Hartley Act, and the amendments of 1959.

Respondents also suggest that the Board majority misinterprets the meaning of "proper balance" in the context of this case when it attempts to equate or balance the economic power of an international union with that of the members of a small multi-employer bargaining unit. It is sheer folly to speak of a proper "balance" in terms of the number of employers and employees covered by the bargaining unit. It is common knowledge that today international unions stand behind and lend aid, financial and otherwise, to their affiliated unions. In many instances international unions, through the parent A.F.L.-C.I.O. organization, or through other mutual undertakings, contribute aid to each other. Today international unions stand prepared to wage successful strikes, regardless of their duration. Strike funds, or "war chests" as they are sometimes called, are maintained or raised as needed. Funds retained by international unions are frequently made available to affiliated local unions.

Respondents urge that they did no more than engage in reasonable "self help" and that the Board's argument that

it properly balanced the conflicting interests is without merit.

QUESTION THREE RESTATED

Whether, assuming the Court upholds the Board's conclusions, the Board's order is too broad because it imposes upon respondents the obligation to pay full back pay to all employees locked out rather than directing the payment of back pay only for those employees actually replaced in their jobs during the lockout.

SUMMARY OF ARGUMENT

The Board's order is too broad insofar as it orders reinstatement with back pay for all employees locked out by respondents rather than in ordering reinstatement with back pay only for those employees actually replaced during the lockout.

ARGUMENT

Respondents urge, assuming that their attempts to operate on a limited basis during the strike and lockout are found to be illegal, that the Board's order is too broad in that it requires back pay for all locked out employees, regardless of whether they were temporarily replaced.

In view of the fact that respondents' original lockout was privileged, it would normally follow that only those employees who were discriminated against by actual replacement after the lockout would be entitled to back pay. Moreover, respondents urge that employees replaced by super-

visory employees and other employees on the payroll who were temporarily brought in from other locations are not entitled to back pay.

It would be manifestly unjust, in light of the fact that there were only limited operations with fewer than the normal number of employees, to order that all locked out employees are entitled to full back pay, irrespective of whether they were replaced. This type of back pay award would, obviously, place an onerous and grossly unfair financial burden on respondents who have already suffered financial losses.

CONCLUSION

For the foregoing reasons, respondents urge that the opinion of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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October Term, 1964

No. 7

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vs.

JOHN BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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To preserve the Multi-Employer Bargaining Group from disintegration, nonstruck employers must be able to temporarily lockout employees and continue to operate with temporary replacements. Buffalo Linen recognized that economic pressures would destroy group bargaining, unless employers had the right to lockout; those same economic pressures would also destroy group bargaining, if the nonstruck members could not continue to operate but had to shut down 4

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS.

Preliminary Statement.

This Amici Curiae Brief in support of Respondents is filed pursuant to Rule 42(2) and pursuant to the written consent of Petitioner and Respondents previously filed herein.

Interest of Amici.

Multi-employer bargaining groups throughout the United States and particularly the associations of employers, who are amici here, are vitally concerned with the decision of the Board in this case: they believe that the Board's decision, if sustained, would sound the death knell for multi-employer bargaining. The interest of amici is very simply in the survival of multi-

employer bargaining practices and relationships which have proved beneficial to both unions and employers for many years.

Amici are employer associations, large and small, who represent a great variety of employers in multi-employer bargaining units throughout a large part of California.

The adverse effect of the Board doctrine, not only on employers, but upon neutrals and the public, is enormous. The drastic consequences are well illustrated by a pending case arising from a recent strike in Los Angeles by building service employees against certain markets represented by Food Employers Council, Inc., one amici here. In an effort to divide and conquer, the union struck a single employer having approximately 50 building service employees. The other employers in the unit responded to the whipsaw by lockout out approximately 700 building service employees. However, if the employers had shut down completely, as the Board says they must, they would have been compelled to lay off approximately 28,027 other employees represented by numerous unions: Retail Clerks (19,969 employees); Meat Cutters (4,123); Teamsters (1,818); Culinary (601); Bakery & Confectionery (541); Machinists (30); Operating Engineers (26); Provision House Workers (8); incidental unions (163).

In addition, the employees of hundreds of supplier firms, strangers to the dispute, would also have been put out of work as the markets closed down and deliveries ceased. Inevitably, the impact on consumers would have been to deny them food and conceivably a serious food shortage could have resulted.

Nor can it be suggested that the Board doctrine only requires that employers cease those operations involv-

ing building service employees. For such work is essential for the markets to remain open: Lights, heat, safe and sanitary premises are absolutely essential. In other words, if the building service employees' work could not have been done by supervisory help or by temporary replacements, the markets would have had to completely close.

Thus, the Board would require that a labor dispute involving a few hundred employees be expanded into one involving many thousands of employees who have no interest in the dispute. The increased consequences for the public of a major labor dispute are obvious. This example could be multiplied many times by reference to the hundreds of multi-employer bargaining groups in which amici participate.

Group bargaining, the primary activity of amici, is under violent attack here. For if the Board's doctrine becomes the law, the rights guaranteed by *Buffalo Linen* become illusory. The multi-employer group becomes a myth and the union's whipsaw tactics become a revitalized weapon against which there is no defense.

Whatever its faults, group bargaining has proved beneficial to employers and unions alike. Only by means of group bargaining can many employers, particularly small employers, hope to deal with unions with any degree of equality. Parity of bargaining power simply cannot exist under the Board's decision.

For these reasons, the interests of amici is obvious. Literally thousands of employers, large and small, members of amici, will have to abandon long standing multi-employer bargaining practices and relationships, thereby becoming unable to attain and maintain the parity of bargaining power which Congress intended to afford.

ARGUMENT.

I.

To Preserve the Multi-Employer Bargaining Group From Disintegration, Nonstruck Employers Must Be Able to Temporarily Lockout Employees and Continue to Operate With Temporary Replacements. Buffalo Linen Recognized That Economic Pressures Would Destroy Group Bargaining, Unless Employers Had the Right to Lockout; Those Same Economic Pressures Would Also Destroy Group Bargaining, if the Nonstruck Members Could Not Continue to Operate but Had to Shut Down.

This Court in the landmark *Buffalo Linen* case of 1957 authorized the use of the lockout by multi-employer groups to protect the integrity and unity of the group and their interest in group bargaining. *NLRB v. Teamsters, Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87, 77 S. Ct. 643 (hereafter *Buffalo Linen*). As in the case at bar, the nonstruck members of a multi-employer unit locked out their employees to defeat the whipsaw tactics of the union. This Court held that the employers could rightfully engage in a "temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action. . . ." 353 U. S. at 97. The Court's opinion is supported by an extensive review of the legislative history of the Act. The Court specifically reversed the Second Circuit on the question of whether Congress had sanctioned bargaining by multi-employer groups declaring that Congress had indeed sanctioned such bargaining.

It is to be noted, in passing, that the Court also refused to define the limits of the legitimate use of the lockout and reserved judgment on the question of whether the right to lockout is the corollary of the right to strike. Compare *Morand Bros. Beverage Co. v. N.L.R.B.*, 190 F. 2d 576 (7th Cir. 1951); Meltzer, Lockouts Under the LMRA: New Shadows on Old Terrain, 28 U. of Chi. L.R. 614; 37 N.Y.U. L. Rev. 1152. It is not necessary to decide that question here. However, the Board's brief proceeds and rests upon the unsupported assumption that employers have no such corollary right to lockout.

Whatever else *Buffalo Linen* did or did not decide, it certainly did uphold the employers' right to lockout to preserve the multi-employer bargaining group. The crux of *Buffalo Linen* is that multi-employer bargaining cannot survive without the right to lockout in defense against union whipsaw tactics. Consider a typical whipsaw situation where the union strikes one employer only. If the other employers then could not stick together (*i.e.*, if they could not lockout), the isolated employer would be the target of all the union economic coercion, and the unity of the group would most certainly be shattered. By the divide-and-conquer strategy, the union also could isolate the employer most vulnerable to the pressure of a strike and concentrate overwhelming pressure on him. After defeating this employer, the union could then proceed to pick off other employers one by one until all were forced to surrender. This Court rightly recognized that economic realities made it imperative that employers have the right to stand together; that is, employers must have the right to consider a strike against one as a strike against all, and

must have the right to lockout, rather than be decimated one by one. Even the Board in the case at bar recognizes this: "If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the 'whipsaw'." These are the economic pressures which the Court in *Buffalo Linen* held to necessitate the right to lockout to preserve the bargaining group.

Turning to the case at bar, again suppose that the union strikes one employer only. The Board concedes that the struck employer may hire replacements and continue to operate. The right of struck employers to operate with replacements has been unquestioned since 1938. *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 58 S. Ct. 904 (hereafter *Mackay*). In 1947, Congress gave statutory recognition to this right in Section 9(c)(3) of the Act and the Landrum-Griffin Amendments of 1959 did likewise.

According to the Board, however, the nonstruck members of the employer unit find themselves in a vastly different position. They are tendered a Hobson's choice, namely:

1. they can take the strike (doing nothing, leaving the single employer isolated, and awaiting their turn); or

2. they can shut down completely, and cease operations.

This Court has said, and the Board concedes, that the first course would be fatal to group bargaining. The second course would likewise be fatal to group bargaining.

What pressures would tend to destroy group bargaining if the second course, that of complete shutdown, were followed? The Board has failed to consider, let alone answer, this question.

According to the Board only the struck employer could continue to operate. With his competition shut down, he might do very well indeed. At the same time, the shut down employers would be suffering enormous losses. All of their fixed costs, such as rent, property taxes, interest and overhead, would continue, as would many of the variable costs. The economic pressures would be irresistible for the nonstruck employers to end the lockout and to leave the struck employer to take the strike alone.

Therefore, precisely the same economic pressures, found persuasive in *Buffalo Linen,* work here to disintegrate the bargaining group. These pressures could only result in the destruction of the bargaining group. If, as this Court has held, these pressures are sufficient to necessitate the right to lockout, they are sufficient to justify the right to continue to operate. The Board gives no consideration to this point. In fact, the Board rejected the offer of evidence respecting the economic necessity of the markets to continue operating. Without any discussion, the Board majority merely concludes that the employers operated with replacements "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

Likewise, in other similar lockout cases, the Board has failed to consider the economic realities which make continued operation necessary. See, for example, *Food Giant Supermarkets,* 145 NLRB No. 124; *The Kroger Company,* 145 NLRB No. 26. In

Food Giant, the record showed without contradiction that unless the employers locked out, the struck employer would have been forced to make a separate agreement with the union, thus destroying the group of four employers; the record further showed that at least one of the employers could not possibly have ceased operating without going completely out of business. The employers there simply had no choice but to lockout and continue operations. Nevertheless, the Board devoted not a single word in its opinion to these factors, In such cases, the Board has apparently considered evidence of economic hardship to be irrelevant. In its brief here, the Board states that such economic factors merely demonstrate that in some industries "a lockout may be more expensive as an employer weapon". (Board Br. p. 14.) That argument misses the point. The question is whether the Board can impose conditions which make the lockout so expensive that it ceases to be available as a defense against the whipsaw.

The Board's position is insupportable. It would, as the court of appeals stated, render illusory the rights guaranteed by *Buffalo Linen.* Since the principle of multi-employer bargaining has the sanction of Congress and since it cannot survive without the right to operate after locking out, the employers' conduct here was privileged under the rationale of *Buffalo Linen.*

In this Court, the Board for the first time has suggested a possible third alternative for non-struck employers, that of a partial lockout: the non-struck employers would continue operations at a level "comparable to that of the struck employer". (Board Br. p. 13.) Such a partial lockout finds no sanction in any Board decision. Can it be doubted that the Board

would hold such a partial lockout unlawful if such a case should ever reach it for decision? Obviously, a partial lockout offers greater possibilities for abuse than an impartial lockout, applied to all employees alike. Indeed, a partial lockout is inconsistent with the Board's opinion in the case at bar. For the Board's opinion reasons that there was no economic necessity for employers to continue operating and that therefore such action must have been retaliatory and discriminatory. If there was no economic necessity for the employers' action, how can a partial lockout be justified? The suggestion of a partial lockout amounts to belated recognition by the Board that employers must be allowed to continue operating.

It is submitted that this Court should reaffirm the rights that flow from *Buffalo Linen* and *Mackay* rather than deny those rights on the ground that the Board may someday sanction the ill-considered alternative of a partial lockout.

II.

The Court of Appeals Properly Denied the Board's Petition for Enforcement Because There Is No Evidence to Support the Board's Finding of Interference, Restraint, Coercion or Discrimination. In the Absence of Such Evidence, the Board Cannot Conclude That the Employer's Continuing to Operate After the Lockout Is Discriminatory and Coercive Per Se.

There is no evidence in the record of any anti-union acts or motivation by the employers. On the contrary, relations between the parties in the past have been exemplary. The strike was settled quickly and normal operations were resumed without animosity on either

side. The temporary replacements were terminated and the regular employees were recalled without friction.

Nevertheless, the Board says that there was unlawful discrimination and coercion because the employers locked out their "employees in order to replace them with other workers"; that ". . . since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activities. . . ." The Board assumes there was no need for the employees to lockout and continue operating. The Board concludes that "it may be reasonably inferred that they do so . . . for the purpose of inhibiting a lawful strike."

To say, as does the Board, that because the employers did not shut down, that they must have intended to discriminate or to coerce is simple nonsense. The employers had every good reason and necessity to keep the doors of their markets open, and these reasons are wholly independent of any anti-union discrimination or coercion. After all, rent and property taxes continue; utility bills must be paid; finance charges do not stop; all of the fixed costs and many of the variable costs of doing business in a competitive industry go on; anticipated profits are lost. Nor would the non-struck employers wish to commit business suicide by shutting down while their struck competitor continued to operate. Yet, the Board concludes that since they did not shut down, they discriminated against and coerced their employees. This supported conclusion cannot supply the evidence demanded by the Act. There is no evidence,

much less the substantial evidence required by Section 10(e).

The dissenting members of the Board state the point succinctly:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8 (a) (3) some form of *discrimination* must be found. The only conceivable discriminatory action in the present case, the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." (Emphasis that of dissenting opinion.)

In addition, the right to hire replacements during a strike and to continue to operate has long been recognized. *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 58 S. Ct. 904 (1938). This right to operate with replacements, coupled with the right to lockout, affirmed in *Buffalo Linen,* wholly justifies the conduct of the employer group here.

There is no basis for drawing a distinction in the context of multi-employer bargaining between the rights of struck employers and non-struck employers to hire replacements. If employers are entitled to treat a strike against one as a strike against all, then *Mackay* applies equally to all employer members of the bargaining unit. The Board's attempt to avoid the impact of

Mackay by saying that the holding does not apply where employees are willing to work is ridiculous. They are willing to work only to implement the whipsaw.

The Board seeks in its majority opinion and in its brief to gloss over these fatal deficiencies and to foreclose judicial review by asserting that:

1. the Board was balancing conflicting interests; and

2. the striking of such a balance has been committed to the peculiar competence of the Board.

Those assertions were rejected by this Court in a highly analogous case, *NLRB v. Insurance Agents' International Union,* 361 U. S. 477, 80 S. Ct. 419 (1960) (hereafter *Insurance Agents*). In effect, the Court stated there must be substantial evidence of the alleged violation of the Act and that assumptions or conclusions by the Board cannot take the place of evidence.

In *Insurance Agents,* the Board had found an 8(b)(3) refusal to bargain violation by the union although the parties had negotiated at great length. The Board found a violation because the union exerted pressure on the employer by engaging in harassing tactics: employees reported late, refused to attend scheduled conferences, refused to follow directions or to write new business. There was no evidence of a refusal to bargain other than engaging in these tacties of economic warfare.

Justice Brennan emphasized that the Act contemplates economic struggle as the ultimate recourse for labor and management. He stated that Congress did not give the Board the power to choose the weapons

each side could use in that struggle. Thus, in reversing the Board, the Court held the use of harassing tactics was nothing more than the employment of an economic weapon. The union's conduct did not itself prove a refusal to bargain; rather, it was wholly consistent with good faith bargaining.

The Court warned that the Board could not, under the guise of determining a violation of the Act, enter the battle arena and attempt to dictate the weapons available to the parties. Justice Brennan specifically rejected the Board's special competence to choose the weapons in the economic struggle. The concurring opinion of three justices emphasized the absolute necessity for evidence to support the Board's finding. The concurring opinion condemned the Board's *per se* proscription of conduct and characterized the Board's action as one of applying an erroneous rule of law, rather than doing its job of evaluating evidence.

The principles of the *Insurance Agent* case are peculiarly applicable here. The Respondents did nothing other than try to survive in the face of the Union whipsaw. The Board, under the guise of finding 8 (a) (1) and 8 (a) (3) violations has actually entered the economic struggle on the side of the union; it is obviously attempting to deny the weapon of lockout to employers, in patent disagreement with *Buffalo Linen*. Faced with a total absence of evidence of discrimination or coercion, the Board is attempting to substitute an erroneous rule of law for that evidence, namely, its unsupported conclusion that continuing to operate after a lawful lockout is *per se* discriminatory and coercive.

Here, the Board did not carefully balance conflicting interests. Here, the Board did not even allow the nature of those interests to be litigated. Here, the Board rejected Respondents' offer of evidence respecting the economic necessity for the markets to continue operating. The Board gave no consideration to the fact that the problem is all the Union's making: the Union alone chose to ignore the bargaining unit, to invoke the whipsaw, and to isolate the weakest employer. The Board made no attempt to balance the Union's right to whipsaw with the employers' right to stick together. Plainly, the Board balanced nothing, but, rather, applied a *per se* rule.

The Board's findings are not supported by substantial evidence. Therefore, the Court of Appeals properly denied the Board's Petition for Enforcement.

Conclusion.

The Board, in transparent disagreement with *Buffalo Linen* and *Mackay,* seeks to emasculate those cases.

The Board's findings are not supported by any evidence at all. The Board merely condemns the employers' continuing to operate after a lawful lockout as discriminatory and coercive *per se.* This erroneous *per se* rule of law cannot take the place of the substantial evidence demanded by the Act. Non-struck members of multi-employer groups must be able to lockout and must be able to operate or their bargaining groups will be destroyed. The reasons found persuasive in *Buffalo Linen* to preserve the bargaining group are equally persuasive here. If the Board's opinion becomes the law of the land, multi-employer bargaining is at an

end. Therefore this Court should reaffirm the rights that flow from *Buffalo Linen* and *Mackay*.

Respectfully submitted,

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